AMERICAN FEDERATION OF	*	**BEFORE BRIAN PATRICK WEEKS,**
STATE, COUNTY AND MUNICIPAL	*	**AN ADMINISTRATIVE LAW JUDGE**
EMPLOYEES COUNCIL 3 (AFSCME)	*	**OF THE MARYLAND OFFICE OF**
v.	*	**ADMINISTRATIVE HEARINGS**
STATE OF MARYLAND	*	
-AND-	*	
STATE OF MARYLAND	*	**OAH No.: SLRB-X-01-19-17149**
v.	*	**SLRB Nos.: 2019-U-03**
		2019-U-06
AFSCME	*	**2019-U-07**

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
STIPULATED FACTS
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

Beginning in September 2018, the American Federation of State, County and Municipal Employees Council 3 (AFSCME) and the State of Maryland (State)[1] met for the purpose of bargaining over wages and compensation for fiscal year 2020 (2018 negotiations). The parties were not able to agree on ground rules for the 2018 negotiations. As a result, on October 15, 2018, AFSCME filed an unfair labor practice (ULP) complaint against the State with the State Labor Relations Board (SLRB) (SLRB Case No. 2019-U-03). Code of Maryland Regulations (COMAR)

[1] Under the collective bargaining law, the Governor, on behalf of the State, is required to designate one or more representatives to participate as a party in collective bargaining negotiations. Md. Code Ann., State Pers. & Pens. § 3-501(a)(1)(i) (2015). The authorized representatives of the Governor in the 2018 negotiations over wages were from the Department of Budget and Management.

14.32.05. AFSCME alleged that the State had committed a ULP during the then-ongoing 2018 negotiations and sought a cease-and-desist order from the SLRB.

The parties subsequently exchanged letters and met but were unable to resolve the disagreement regarding the ground rules prior to the statutory deadline for reaching an agreement on items, such as wages, that must be included in the Governor's budget. On December 31, 2018, the State filed a ULP complaint with the SLRB (SLRB Case No. 2019-U-06) against AFSCME. The State alleged that AFSCME had committed a ULP during the 2018 negotiations by not agreeing to the ground rules proposed by the State. As relief, the State sought a cease-and-desist order from the SLRB and additional injunctive relief requiring AFSCME to post and maintain, for sixty days, a signed notice regarding AFSCME's obligations during collective bargaining. On January 11, 2019, AFSCME filed an additional ULP complaint with the SLRB (SLRB Case No. 2019-U-07) against the State. In the complaint, AFSCME alleged that the State had violated its duty to bargain during the 2018 negotiations.

On February 22, 2019, the SLRB determined that probable cause existed for each of the claims set forth by AFSCME and by the State in the three cases, and that the claims should move forward for review by the full SLRB. COMAR 14.32.05.02H. The SLRB further determined that all three complaints pertained to the same or substantially similar disputes, and therefore the three complaints should be consolidated and addressed in a single hearing. On May 14, 2019, the SLRB notified the parties by letter that it had consolidated the three complaints and that it would be referring the complaints to the Office of Administrative Hearings (OAH) for proposed findings of fact and proposed conclusions of law. COMAR 14.32.02.01.

On July 2, 2019, I conducted a telephone prehearing conference (Conference). I was located at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Assistant Attorney General Clifton R. Gray represented the State and David Gray Wright, Esquire, represented AFSCME.

At the Conference, the parties agreed that the hearing would be held at the OAH in Hunt Valley, Maryland, on the following dates: September 4, 5, 6 and 9, 2019. On July 10, 2019, I issued a Prehearing Conference Report and Scheduling Order.

On August 13, 2019, the State filed a Motion to Compel Discovery (Motion to Compel). On August 14, 2019, AFSCME filed a response to the Motion to Compel, which was captioned as an opposition motion and a Motion for Protective Order. In its Motion for Protective Order, AFSCME argued that the documents requested by the State in its discovery request are protected by legislative privilege. AFSCME copied Sandra Brantley, Assistant Attorney General and Counsel to the General Assembly, on its Motion for Protective Order. By email, Ms. Brantley informed the parties and the OAH of the General Assembly's interest in preserving the constitutional privilege related to the legislative activities of the General Assembly. I held a hearing by telephone (Motions Hearing) on August 15, 2019, to allow the parties to argue their respective positions regarding the State's Motion to Compel and AFSCME's Motion for Protective Order. David W. Stamper, Assistant Attorney General, Office of Counsel to the General Assembly, was present at the Motions Hearing but did not participate or move to intervene. For the reasons stated on the record, I denied the Motion to Compel in part. That denial was memorialized in a letter and order dated August 16, 2019. I also reserved ruling on the question of legislative privilege to allow the General Assembly to move to intervene in the matter.

On August 20, 2019, the General Assembly filed a Motion to Intervene. COMAR 14.32.02.05. The General Assembly argued that it should be allowed to intervene in order to assert legislative privilege and oppose the disclosure of documents sought by the State that embody or concern communications between AFSCME and members of the General Assembly that relate to the members' legislative activities. Neither the State nor AFSCME opposed the

General Assembly's Motion to Intervene. On September 3, 2019, I granted the Motion to Intervene.[2]

I held a hearing on the merits on September 4, 5, 6, 9, 18, and 19, 2019, at the OAH in Hunt Valley, Maryland. David Gray Wright, Esquire, represented AFSCME. Assistant Attorneys General Clifton R. Gray and Brent Bolea represented the State. Assistant Attorney General David W. Stamper represented the General Assembly. On the final day of the hearing, AFSCME and the State agreed to submit written memoranda of law on or before October 7, 2019, and I kept the record open until that time for that limited purpose.

The contested case provisions of the Administrative Procedure Act, the SLRB's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019); COMAR 14.32.02; COMAR 28.02.01.

ISSUES

(1) Whether the State committed a ULP during the 2018 negotiations by:

(a) Refusing to meet with AFSCME for weekly in-person negotiations;

(b) Seeking to restrain AFSCME's communication to its members;

(c) Seeking to restrain AFSCME's communication to the legislature;

(d) Disregarding the collective bargaining calendar;

(e) Requiring AFSCME to agree on subjects that are not mandatory subjects of collective bargaining; and

(f) Requiring AFSCME to agree to its ground rules before beginning to collectively bargain.

[2] Prior to the issuance of my written order granting the Motion to Intervene, the State withdrew its Motion to Compel. Due to a clerical error, I did not receive the State's filing in which it withdrew its Motion to Compel until September 4, 2019, the first scheduled day of the hearing.

(2) Whether AFSCME committed a ULP during the 2018 negotiations by:

(a) Refusing to agree that it would not communicate on its publicly-accessible social media websites about what occurred during negotiations; and

(b) Refusing to agree that it would first attempt to collectively bargain with the State over mandatory subjects of bargaining such as wages before going to the legislature to seek changes over such subjects.

SUMMARY OF THE EVIDENCE

Exhibits

I admitted joint and party exhibits as set forth in the attached Appendix.

Testimony

AFSCME presented the testimony of the following witnesses:

- Sue Esty, AFSCME Senior Advisor;
- Stuart Katzenberg, AFSCME Director of Collective Bargaining and Growth;
- Ginger Noble, President of AFSCME Local 354;
- Wynton Johnson, President of AFSCME Local 631;
- Robert Joshua Smead, AFSCME Shop Steward at Local 1427;
- Jessica Spiegel, AFSCME Shop Steward at Local 266;
- Anthony Washington, Sr., President of AFSCME Local 3661; and
- Katherine Moy-Santos, AFSCME Communications Director.

The State presented the testimony of Cynthia Kollner, Executive Director, Department of Budget and Management (DBM), Office of Personnel Services and Benefits.

STIPULATED FACTS[3]

1. AFSCME is the exclusive representative of Executive Branch employees of the State of Maryland assigned to bargaining units A, B, C, D, and F.

2. AFSCME is also the co-exclusive representative of certain other Executive Branch employees assigned to the Department of Public Safety and Correctional Services as bargaining unit H.

3. AFSCME was first designated an exclusive bargaining representative of Executive Branch employees after secret ballot elections were conducted by the Department of Labor, Licensing and Regulation under Executive Order 01.01.1996.13 (issued on May 24, 1996) between 1996 and 1999.

4. As reported by DBM on January 1, 2019, the total number of full time equivalent positions included in Executive Branch collective bargaining units under the State Personnel Management System (SPMS) as of June 30, 2019 was 24,234.

5. As reported by DBM as of October 27, 2017, the total number of Executive Branch SPMS employees included in the bargaining units assigned to AFSCME was 17,893.

6. AFSCME represents 74-75% of all Executive Branch employees in bargaining units covered by the SPMS.

7. Executive Branch employees for which AFSCME is an exclusive representative are disbursed among more than 800 work sites located throughout each of the twenty-four counties of the State and the City of Baltimore.

8. AFSCME concluded the first collective bargaining agreements with the State of Maryland for bargaining units A, B, C, D, F and H in 1997.

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[3] AFSCME and the State jointly submitted forty-seven stipulated facts prior to the start of the merits hearing. On the first day of the hearing and for the reasons stated on the record at that time, I declined to accept certain findings of fact. I have declined to accept certain additional facts beyond those addressed on the record on September 4, 2019, on the basis that the omitted facts are duplicative of other stipulated facts. COMAR 28.02.01.21G.

9. The 1997 agreements to cover terms and conditions of employees for Executive Branch employees under the 1996 Executive Order covered Fiscal Years 1999 and 2000.

10. In 1999, still under the Executive Order, the State and AFSCME entered into new Memoranda of Understanding (MOU) for fiscal years 2001 and 2002.

11. The SLRB was organized as an independent unit of State government subsequent to the enactment of the collective bargaining statute in 1999.

12. AFSCME and the State currently are parties to two MOUs, one for units A through D and F, and another for unit H, concluded for a contract term of three years, from January 1, 2018 through December 31, 2020.

13. Under Article 42 of each MOU, all gubernatorial matters of agreement (all terms excepting Article 6, "Workweek, Work Time, Schedules, Overtime and Compensatory Time," Article 7, "Wages," Article 9, "Leave Accrual," Article 10 "Leave with Pay," Article 19, "Within Grade Increases," Article 25, "Insurance and Benefits," and any other provision that has a budgetary impact to the State or otherwise requires legislative approval or the appropriation of funds) took effect January 1, 2018 and are to remain in effect for a period of three years, through December 31, 2020 as authorized under Section 3-601(b) of the State Personnel and Pensions Article.

14. The terms of Article 6, "Workweek, Work Time, Schedules, Overtime and Compensatory Time," Article 7, "Wages," Article 9, "Leave Accrual," Article 10, "Leave with Pay," Article 19, "Within Grade Increases," Article 25, "Insurance and Benefits," and any other provision of the Agreement that has a budgetary impact to the State or otherwise requires legislative approval or the appropriation of funds under Section 3-501(c)(2)(ii) and (d)(2) of the State Personnel and Pensions Article stand as executory pending approval by the Governor-elect and the General Assembly, in calendar year 2019 under the Maryland Gubernatorial Transitions

Act, Md. Code Ann., State Gov't §§ 3-201 et seq., and in budget years thereafter as consistent with the Maryland Constitution.

15. Under Article 44, Section 2 of each MOU, either party may "reopen" the terms of a MOU, in September of each succeeding year (i.e., beginning with September 2018) for the purpose of negotiating over "economic issues" for the following fiscal year and any other matter mutually agreed upon.

16. In August 2018, the AFSCME Council gave notice to "reopen" each MOU for the limited purpose of bargaining over wages and compensation for all covered employees for Fiscal Year 2020, meaning the twelve-month period beginning July 1, 2019.

17. AFSCME advised the State that it was "prepared to engage in bargaining beginning September 11th, 2018 over wages and other potential compensation for FY 2020."

18. DBM is the State's chief representative in collective bargaining.

19. In addition to the Office of the Governor and DBM, the State has created three units of government: the Department of Legislative Services; Board of Revenue Estimates; and the Spending Affordability Committee. Each of the three units participates in the annual appropriation cycle, before, during, and after a budget is proposed by the Governor, in defined roles.

20. Pursuant to the limited reopener provision of the MOU, the parties first met on September 26, 2018. Prior to or during that first meeting, the parties exchanged proposed ground rules for the limited reopener negotiations. At the conclusion of the meeting, the parties agreed to meet next on October 12, 2018.

21. The chief negotiator representing the State during the 2018 limited reopener negotiations was Cynthia Kollner, Executive Director of DBM's Office of Personnel Services and Benefits.

22. The chief negotiator representing AFSCME during the 2018 limited reopener negotiations was Patrick Moran, President of AFSCME.

23. By email dated September 4, 2018, the State offered to begin bargaining on September 26, 2018. AFSCME and the State agreed to commence negotiations on September 26, 2018.

24. In a letter dated October 1, 2018, AFSCME voiced its objections to certain of the State's proposed ground rules. The State responded to AFSCME's objections in a letter dated October 10, 2018.

25. The State and AFSCME had four in-person negotiation sessions during the time of the 2018 limited reopener. These in-person negotiation sessions were held on the following dates: September 26, 2018, October 12, 2018, November 8, 2018, and November 14, 2018.

26. During the time of the 2018 limited reopener, the State and AFSCME exchanged written letter correspondence discussing negotiations, including the proposed ground rules.

27. The State sent letters to AFSCME dated October 10, 2018, October 16, 2018, November 1, 2018, November 20, 2018, November 27, 2018, December 4, 2018, and December 19, 2018.

28. AFSCME sent letters to the State dated October 1, 2018, October 22, 2018, October 31, 2018, November 20, 2018, November 26, 2018, November 29, 2018, December 14, 2018, December 20, 2018, and December 27, 2018.

29. The first report providing revenue estimates for Fiscal Year 2020 (July 1, 2019 to June 30, 2020) was submitted to the Governor on September 24, 2018, and a report detailing revised estimates for Fiscal Year 2020 was submitted to the Governor on December 12, 2018.

30. AFSCME has a Facebook page/account which existed and was utilized during the 2018 limited reopener as well as during the 2017 negotiations with the State for a successor MOU.

31. AFSCME has a Twitter page/account which existed and was utilized during the 2018 limited reopener as well as during the 2017 negotiations with the State for a successor MOU.

32. AFSCME has a website which existed and was utilized during the 2018 limited reopener as well as during the 2017 negotiations with the State for a successor MOU.

PROPOSED FINDINGS OF FACT

AFSCME Background and Local Unions

33. AFSCME is a statewide organization that encompasses more than thirty local unions.

34. AFSCME represents about 4,000 correctional officers. Cell phones are barred from correctional facilities.

35. AFSCME Local 354 is an amalgamated local that includes State employees from at least thirteen agencies, including the Department of Health, Department of Agriculture, Department of Natural Resources, Department of the Environment, State Department of Assessments and Taxation, and Maryland Lottery and Gaming Control Agency.

36. AFSCME Local 354 covers approximately 375 State employees, of which approximately 260 are members of AFSCME.

37. AFSCME Local 354 covers at least twenty-four work sites located in Frederick and Washington Counties.

38. The email list of AFSCME Local 354 contains approximately half of its employees' email addresses.

39. AFSCME Local 354 has a Facebook page and a Twitter account.

40. AFSCME Local 631 includes State employees from the State Highway Administration, as well as park rangers and State employees in certain medical facilities.

41. AFSCME Local 631 includes a total of approximately 600 State employees, 400 of which are members of AFSCME.

42. AFSCME Local 631 covers approximately ten work sites located in Prince George's, Montgomery, St. Mary's, and Calvert Counties.

43. AFSCME Local 631 forwards AFSCME Council 3 email communications to its email list, including bargaining summaries.

44. Approximately 85% of the facility maintenance technicians represented by AFSCME Local 631 do not have State government email addresses.

45. AFSCME Local 631 has a Facebook page. The press has never contacted AFSCME Local 631 regarding any posting from its Facebook page.

46. AFSCME Local 1427 includes a total of more than 2,000 State employees, of which approximately 75% are members of AFSCME.

47. AFSCME Local 1427 covers four jail facilities in Baltimore City.

48. AFSCME Local 1427 has an email list that contains email addresses for approximately half of its employees.

49. AFSCME Local 1427 has a closed group on Facebook that has approximately fifty-five members.

50. At all times relevant to this matter, AFSCME Local 1427 has not spoken to the press regarding the status of collective bargaining negotiations.

51. AFSCME Local 266 includes a total of approximately 400 State employees.

52. AFSCME Local 266 covers Department of Health employees at two facilities: the Regional Institute for Children and Adolescents in Rockville and Spring Grove Hospital in Catonsville.

53. At all times relevant to this matter, the press has not reached out to AFSCME Local 266 regarding the status of collective bargaining negotiations.

54. AFSCME Local 3661 includes a total of approximately 650 State employees.

55. AFSCME Local 3661 covers Division of Parole and Probation employees located throughout the State.

56. AFSCME Local 3661 maintains a public Facebook page and a closed Facebook group.

AFSCME Communication Requirements

57. The AFSCME Constitution has a bill of rights for its members. Paragraph 2 states, "Members shall suffer no impairment of freedom of speech concerning the operations of this union. Active discussion of union affairs shall be encouraged and protected within this organization." Paragraph 7 states,

> Members shall have the right to full participation, through discussion and vote, in the decision-making processes of the union, and to pertinent information needed for the exercise of this right. This right shall specifically include decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment. All members shall have an equal right to vote and each vote cast shall be of equal weight.

58. On or about June 22, 1984, the international branch of AFSCME passed a resolution at its twenty-sixth international convention that the international branch maintain a full range of educational programs designed to promote and encourage local union newsletters and other rank-and-file communications in the interest of ensuring that the membership is aware and participates in the full activities of the union.

59. In 2006, delegates to the thirty-seventh International AFSCME convention adopted the 21st Century Power to Win plan. The plan includes the following priorities, among others: "[B]uild more membership participation" and "increase our membership." The plan includes a checklist for local unions that includes yes or no answers to the following question, among others, "Does your local have a website and/or regularly publish a newsletter?"

60. The AFSCME Officers Handbook is a guide for local union leaders. The 2017 version of this document includes tasks to be completed during collective bargaining by the negotiating committee. Among the listed tasks is "communicating with members about trends and progress in negotiations." The handbook also states that "[c]onstant, effective communication – to inform and educate the members as well as increase union visibility in the workplace and community – is key to building a strong local union."

61. The AFSCME Steward Handbook is a guide intended to help stewards become effective. The handbook advises stewards to organize new members through the following means: "If you do not have a central work location, go where your co-workers congregate . . . . Provide union literature . . . and materials about specific topics . . . so (new members) can see union efforts on issues that affect them. Update your local union website so members can get current information online."

AFSCME Communication Tools

62. AFSCME has the ability to reach roughly 75% of its bargaining unit members through email.

63. AFSCME utilizes a client relationship manager called Action Network to help manage its emails to bargaining unit members.

64. On average and as tracked by Action Network, emails sent by AFSCME to bargaining unit members are opened 30% of the time.

65. AFSCME has had a website since at least 2012. Approximately two years ago, AFSCME began to utilize Union Hall, a website creation service, to manage the content on its webpage. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has a contract with Union Hall and offers Union Hall to state organizations such as AFSCME. Union Hall helps AFSCME affiliates and locals create and maintain their website.

66. The Union Hall template that is available to AFSCME and unions in other states does not have a log-in feature or another authentication feature that limits who can view the website. There is a log-in link on the webpage that is utilized by the Director of Communications and IT Coordinator to update or administer the webpage.

67. One of the tabs on the AFSCME webpage is an "Updates" tab. AFSCME's communication director puts collective bargaining updates on this webpage. The majority of the updates on the webpage are not related to the status of collective bargaining negotiations.

68. AFSCME has an Instagram account that it utilizes to communicate with the members in its bargaining unit.

69. AFSCME uses text blasts to communicate with the members in its bargaining unit. A text blast utilizes automated software to send texts to a large list of cellular phone numbers.

70. AFSCME tweets approximately four to six times per week.

71. AFSCME posts to Facebook an average of three to four times per day, shares content at least once a day, and posts five photos of members per week. For AFSCME's Facebook posts related to the status of collective bargaining, there is a higher level of engagement as measured by likes, comments, and shares, as compared to posts that are not about the status of collective bargaining. AFSCME does not maintain any closed groups on Facebook.

72. AFSCME does not utilize an external communications plan for collective bargaining negotiations. For matters outside of collective bargaining, AFSCME issues press releases to a network of press contacts. AFSCME sends its press releases directly to its press list by email or fax.

AFSCME Bargaining Team

73. The AFSCME bargaining team consists of fifty total members, as follows:

- Nineteen members from the Council 3 executive board;
- Eleven regional members nominated and elected;
- Seventeen members nominated and elected by agency; and
- Three members chosen by the AFSCME President.

74. AFSCME provides a summary of responsibilities to prospective bargaining team members to make them aware of their rights and responsibilities. The AFSCME bargaining team has, among other responsibilities, the responsibility to maintain confidentiality as a basic qualification for a team member. The AFSCME bargaining team members have the responsibility to communicate with members and back to the bargaining team, and to be accessible for communication. The AFSCME bargaining team members are also expected to be ready to communicate with politicians regarding important issues that arise in bargaining.

Prior Negotiations

75. It has been the practice of the parties to engage in two types of collective bargaining negotiations: major negotiations for a three-year agreement that encompasses wages and non-economic terms and conditions of employment, and yearly negotiations solely on economic terms and conditions of employment in the interim years between the three-year agreements.

76. Since the advent of collective bargaining, the parties have at times engaged in collective bargaining without first agreeing to ground rules.

77. In some, but not all, years, the ground rules for negotiations have required AFSCME and the State to present proposals by a date certain.

78. On June 24, 1997, AFSCME and the State agreed to ground rules for the first collective bargaining negotiations between the parties. Section 8 of the ground rules stated:

> All bargaining sessions are closed to the public. Tape recordings or other verbatim transcript of proceedings will not be made. The parties agree not to discuss the negotiations with the media during negotiations. Any information released to the media during negotiations will be in the form of joint, mutually agreed to press releases.

2016 Negotiations

79. On December 8, 2016, AFSCME and the State agreed to ground rules for collective bargaining negotiations for a one-year agreement on economic terms and conditions of employment. Section 6 of the ground rules stated, in pertinent part:

> All bargaining sessions shall be considered closed sessions and will be closed to the public. No recordings or other verbatim transcripts of proceedings will be made. During the period of negotiations, from the initial bargaining session through the final session, the parties agree not to discuss the proceedings with the media. The parties further agree that neither side shall unilaterally issue news releases regarding what transpires at bargaining sessions . . . the Union may communicate with bargaining unit members about bargaining and about topics subject to bargaining. Communications with members shall be general, factual, and professional in tone. The Union may post general information about bargaining on the Union's website and its Facebook page, in emails to its bargaining unit members, and through other social media. Such communications shall not be directed to the public at large.

80. AFSCME utilized its website and social media channels to communicate with its members about the status of the 2016 negotiations. AFSCME did not receive any press inquiries as a result of its website and social media activities. AFSCME did not issue any press releases or discuss the progress of negotiations in the media during the 2016 negotiations.

81. At the bargaining table, the State expressed concern to AFSCME regarding its use of its webpage and social media channels to communicate with its members about the status of the 2016 negotiations. The State did not identify any particular communication that it found objectionable and did not take any further action regarding its concerns.

2017 Negotiations

82. In June 2017 there was an issue where certain State employees were not receiving emails sent by AFSCME because certain emails were being routed to the Spam folder or otherwise blocked by the State's email system.

83. AFSCME proposed ground rules for the 2017 collective bargaining negotiations in or around early August 2017. The proposed ground rules were longer and more detailed than the 2016 ground rules. The parties exchanged different versions of the ground rules during August 2017.

84. On August 30, 2017, both parties agreed to ground rules for the 2017 collective bargaining negotiations for a three-year comprehensive agreement on economic and non-economic terms and conditions of employment. The ground rules required each party to present non-economic proposals at the first bargaining session during the week of September 4, 2017, and economic proposals no later than the week of October 9, 2017. The ground rules required the parties to meet at least once a week and every week. The language regarding closed sessions and communication to the press and to AFSCME's members remained identical to the language in the 2016 ground rules.

85. The parties began bargaining on September 7, 2017, and met at least once each week, but were unable to reach agreement on all issues. On October 25, 2017, AFSCME submitted a written demand to the State that a fact finder be employed to resolve outstanding areas of disagreement including provisions related to wages, shift differential, benefits premium holiday, holidays, and requests for personal and annual leave. On November 19, 2017, the fact

finder issued written recommendations related to both AFSCME and the State's fact finding demands, recommending that some of AFSCME's demands be accepted, while others be denied. The fact finder also recommended that some of the State's demands be accepted, while others be denied.

86. AFSCME posted at least eight bargaining updates on its website throughout the 2017 negotiations beginning September 20, 2017 and ending December 20, 2017. In the bargaining updates, AFSCME provided its proposals and the State's proposals, as well as the State's responses to AFSCME's proposals. AFSCME did not provide any source documents reflecting the actual proposals exchanged and did not provide verbatim transcripts or audio recordings of the meetings. Some of the updates were posted to AFSCME's webpage the same day that the meeting took place. One of the updates, from October 4, 2017, contained a specific statement made by the State during a meeting as follows: "'Cyclical nature' of work may lead to extending the probationary period." None of the other updates contained direct quotes of statements made by the State.

87. AFSCME tweeted a link to its webpage that contained the bargaining unit updates throughout the 2017 negotiations. Some of the tweets were sent the same day that the meeting took place. AFSCME did not tag any other Twitter users in the body of the tweets. The tweets were responded to in the following ways by Twitter users:

- September 20, 2017 – no retweets, no likes
- September 21, 2017 – no retweets, no likes
- October 4, 2017 – one retweet, one like
- October 11, 2017 – no retweets, two likes
- October 20, 2017 – no retweets, two likes
- October 23, 2017 – two retweets, three likes

- November 1, 2017 – no retweets, no likes
- December 20, 2017 – two retweets, four likes

88. On its Facebook page, AFSCME posted a link to its webpage that contained the bargaining unit updates at multiple times during the 2017 negotiations.

89. AFSCME did not issue any press releases about the status of negotiations during the 2017 negotiations.

90. AFSCME Local 354 sent out its own summaries regarding the status of the 2017 negotiations to its members. These summaries were based on the AFSCME summaries but were edited to focus on issues pertaining to AFSCME Local 354 members.

91. AFSCME Local 354 did not engage in any discussions with the press regarding the status of collective bargaining negotiations in 2017. The press approaches AFSCME Local 354 on certain other issues like work safety issues.

92. AFSCME Local 3661 would take a photo of a printout of AFSCME's bargaining updates on its webpage from the 2017 negotiations and post it to its Facebook page and also include a link to AFSCME's webpage that contained the bargaining updates. AFSCME Local 3661 did not receive any press inquiries as a result of its Facebook posts during the 2017 negotiations.

93. The ratification process for the 2017 MOU extended beyond December 31, 2017, and into 2018.

94. During the 2017 negotiations, at the bargaining table, the State expressed concern to AFSCME regarding its use of its webpage and social media channels to communicate with its members about the status of the 2017 negotiations. The State did not identify specific updates or language that it found objectionable. The State did not take any further action regarding its concerns.

95. The 2017 MOU contains a provision that states that the "Employer and the Union expressly agree not to seek statutory changes in working conditions that are mandatory subjects of bargaining when such changes have not been subject to the bargaining described in this Article [33]."

2018 Negotiations

96. On September 21, 2018, AFSCME proposed ground rules for the 2018 negotiations.

97. Regarding the timetable for negotiations, the original version of the ground rules specified:

> Negotiations will commence during the week of September 24, 2018. The parties agree to make every effort to conclude negotiations before October 25, 2018, notwithstanding any reports expected subsequently [from] the Board of Revenue Estimates. At the first bargaining session each party shall present all of its initial economic proposals. That the Board of Revenue Estimates has not reported or released data shall not delay the conduct or completion of negotiations.

98. AFSCME proposed that the ground rule remain the same as the ground rule from the 2017 negotiations that required the parties to meet at least once a week and every week until an agreement was reached.

99. On October 12, 2018, the State offered to meet at least every other week and more frequently if needed.

100. The failure of the State to agree to the timetable and the cadence of negotiations proposed by AFSCME on September 21, 2018, prompted AFSCME to file its initial ULP complaint with the SLRB on October 15, 2018.

101. On October 16, 2018, the State proposed that the parties meet October 19, 2018. By letter response to the State, AFSCME indicated that "[t]ime for negotiations sufficient to support a fact finding proceeding has now passed."

102. By November 8, 2018, subsequent to the filing of AFSCME's initial ULP complaint, the following language related to the timetable was in the proposed ground rules: "Negotiations will commence during the week of September 24, 2018. The parties agree to adhere to the process and the deadlines outlined in [State Personnel and Pensions Article] Section 3-501." The proposed ground rules also obligated the parties to meet at least every other week.

103. AFSCME proposed that the ground rule regarding closed bargaining sessions and communication remain the same as the ground rule from the 2016 and 2017 negotiations.

104. In its initial response on September 26, 2018 to the ground rule regarding closed bargaining sessions and communication, the State struck the following language: "The Union may post general information about bargaining on the Union's website, its Facebook page, in emails to its bargaining unit members, and through other social media. Such communications shall not be directed to the public at large." The rest of the ground rule remained identical to the ground rule used during the 2017 negotiations.

105. On September 26, 2018, the State proposed adding the following language to the ground rules: "The parties expressly agree not to seek statutory changes that would otherwise fall under this limited reopener when such changes have not been subject to the bargaining process." AFSCME rejected this language in its entirety throughout the 2018 negotiations.

106. Prior to November 8, 2018, AFSCME drafted its economic proposal, which consisted of a 3% cost of living adjustment (COLA) wage increase for each grade and step of the pay plan effective no later than July 1, 2019, a 1% COLA for each grade and step of the pay plan no later than April 1, 2020, and a step increase for all eligible employees during fiscal year 2020.

107. On November 8, 2018, AFSCME proposed the following language in a counterproposal to the State: "The specific proposals made by the parties during bargaining

sessions shall not be discussed or otherwise disclosed on the Union's publicly-accessible websites. The Union may post general information about bargaining on the Union's website, its Facebook page, in emails to its bargaining unit members, and through other social media." The rest of the ground rule remained identical to the ground rule used during the 2017 negotiations.

108. On November 14, 2018, the parties met and AFSCME attempted to hand a document with its substantive wage proposal to the State, but the State refused to take the document.

109. On November 21, 2018, the State proposed the following language in a counterproposal to AFSCME: "Specific proposals made by the parties during bargaining sessions shall not be discussed or otherwise disclosed on the Union's publicly-accessible websites. The Union may post general information about dates and times of bargaining on the Union's website, its Facebook page and through other social media." The rest of the ground rule remained identical to the ground rule used during the 2017 negotiations.

110. On November 21, 2018, the State proposed adding the following sentence immediately following the sentence prohibiting statutory changes: "The parties are otherwise free to support or oppose legislation affecting bargaining unit members."

111. On November 26, 2018, AFSCME indicated in a letter that it would not accept the State's proposed ground rules.

112. On November 27, 2018, the State sent a letter to AFSCME in which it asked AFSCME to reconsider its position on the ground rules. The letter ends with the following: "If you remain entrenched in your position, we will have no other option than to cancel the bargaining session tentatively scheduled for later this week."

113. On November 29, 2018, AFSCME wrote a letter to the State and stated that it would not agree to the State's proposed ground rules. AFSCME proposed three options for

proceeding: set aside the disputed provisions and proceed with the ground rule provisions that had been agreed to thus far, utilize the ground rules from the 2017 negotiations, or proceed to bargain without ground rules. AFSCME offered the following dates for bargaining: December 5, 13, or 14, 2018.

114. On December 4, 2018, the State wrote a letter to AFSCME in which it stated that it "will not engage in any further negotiation with AFSCME unless and until AFSCME agrees to comply with its statutory bargaining obligations . . . ."

115. On December 14, 2018, AFSCME wrote a letter to the State in which it offered the following dates for bargaining: December 21, 27, 28, and 29, 2018.

116. On December 19, 2018, the State wrote a letter to AFSCME and did not agree to bargain with AFSCME.

117. On December 20, 2018, AFSCME sent a letter to the State and offered the following dates for bargaining: December 27, 28, 29, and 31, 2018.

118. The State never responded to AFSCME's December 20, 2018 letter.

119. AFSCME did not issue any press releases related to the 2018 collective bargaining negotiations.

Legislative Activities

120. Prior to the advent of collective bargaining for Maryland State employees, AFSCME maintained an active legislative program and met with members of the General Assembly to support or oppose specific bills relating to the terms and conditions of employment for State employees.

121. Since the collective bargaining statute was passed, the General Assembly has continued to introduce bills relating to the terms and conditions of employment for State employees.

122. During the 2018 legislative session, AFSCME supported House Bill 864, cross-filed as Senate Bill 654, which requires an MOU to remain in effect until a successor MOU is agreed to and ratified.

123. During the 2018 legislative session, AFSCME supported House Bill 1017, cross-filed as Senate Bill 677, which expanded an exclusive representative's access to State employee contact information and gave exclusive representatives the ability to address new employees during a new employee program. DBM and other State agencies testified in opposition to the bill.

Budget Process

124. To help prepare the Governor's budget, DBM meets with the secretaries of executive departments in October and November. In December, DBM gathers agency budget submissions to finalize the budget.

DISCUSSION

I. Introduction

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937), the United States Supreme Court, in upholding the constitutionality of the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended in 29 U.S.C.), observed that:

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

This case presents profound questions regarding when, in the course of collective bargaining, this most prolific cause of strife, refusal to confer and negotiate, is warranted.

Beginning in 1996, as a result of an Executive Order (EO) issued by Governor Parris Glendening, State employees from the principal departments within the Executive Branch have had the right to sit at the bargaining table with the Governor's representative in order to collectively bargain over wages, hours, and other terms and conditions of employment. COMAR 01.01.1996.13. In 1999, the right to collectively bargain was codified at Title 3 of the State Personnel and Pensions Article (collective bargaining law or CBL).

The 1996 EO and subsequent passage of the collective bargaining law represented a major change from the status quo whereby the Governor could unilaterally change the wages, hours, and other terms and conditions of employment of State employees. *See Md. Classified Emp. Ass'n v. Schaefer*, 325 Md. 19 (1991), *cert. denied*, 502 U.S. 1090 (1992) (upholding the validity of an EO that increased the work week of most State employees from thirty-five and a half to forty hours without additional compensation). Therefore, the collective bargaining law, and the collective bargaining requirement itself, operate principally as a restriction on the Governor's otherwise broad authority to supervise and direct Executive Branch employees. In limiting the Governor's authority to act in this area, the General Assembly expressed its intention that wages, hours, and other terms and conditions of employment be negotiated at the bargaining table, between the Governor and State employees.

In 2018, the State failed to confer and negotiate with AFSCME over proposed wage increases because AFSCME would not agree to two ground rules—one restricting AFSCME's communications with the General Assembly, and the other restricting AFSCME's ability to communicate the status of negotiations on its website and social media. The State's refusal to negotiate meant that more than 17,000 State employees—labor and trades workers; administrative, technical, and clerical workers; regulatory, inspection, and licensure workers; health and human service non-professionals; social and human service professionals; public

safety and security workers—were all denied the opportunity to collectively demand that the State provide them with a wage increase commensurate with their work on behalf of the citizens of Maryland.

I am asked to determine whether the State's refusal to confer and negotiate with AFSCME during the 2018 collective bargaining negotiations constitutes a ULP. I conclude that the State's proposed ground rules do not cover mandatory subjects of bargaining and AFSCME was free to agree or not to agree to the ground rules. The State conditioned its willingness to bargain over wages on AFSCME's acceptance of the ground rules. Thus, I conclude that the State committed a ULP.

Central to my conclusion that the State committed a ULP is the fact that the activities that the State sought to restrict through its proposed ground rules are protected by the Constitution and by the collective bargaining law. The targeted activities are at the very core of a union's duties to each and every employee it represents. A union cannot be compelled to give these rights up in order to avail itself of its entirely separate statutory right to sit down at the bargaining table with the State to bargain over wages. Nor can a union be compelled by the State to abdicate its legal duty to fairly represent every employee that it represents.

Moreover, the proposed ground rules directly contradict the General Assembly's intent and raise separation of powers concerns. Although the collective bargaining law requires negotiating sessions to be closed to the public, there is no indication that the General Assembly intended to impair the constitutional rights to free speech and association and the right to petition the legislature for a redress of grievances, or to impair the other statutory rights of employees spelled out in the collective bargaining law. In fact, the most recent change to the collective bargaining law evinces the General Assembly's intent that unions have a broad right to speak to every employee in its bargaining unit, even those who choose not to become a dues-paying

member of the union. Additionally, when passing the CBL in 1999, the General Assembly made express its intent that it retains the right to continue to legislate in the area of State employee wages, hours, and other terms and conditions of employment, regardless of what occurs at the bargaining table.

This case also presents questions regarding the nature of the fact finding process that the legislature added to the collective bargaining law in 2006 and the timelines for collective bargaining. I conclude that the collective bargaining law does not require the parties to meet in person on a weekly basis, as AFSCME asserts. However, I conclude that the collective bargaining law implicitly requires the parties to at least begin negotiations prior to the statutory deadline to request that a fact finder be employed. That did not occur in this case because the State required AFSCME to agree to its ground rules before beginning substantive negotiations, and this provides a separate basis for my conclusion that the State committed a ULP.

II. Governing Law

A. The National Labor Relations Act

The struggle of workers during the industrialization era fueled a labor movement that grew to three million members by World War I. *See* NLRB, *80 Years: 1935 – 2015*, at 14 https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf [hereinafter NLRB: 80 Years]. In 1918, President Woodrow Wilson created a War Labor Board, which recognized the "right of workers to organize in trade unions and to bargain collectively through chosen representatives." *Id.* at 14-15 (internal quotation marks omitted). The short-lived War Labor Board had no enforcement powers but mediated a truce between labor and management to refrain from strikes and lockouts. *Id.* at 15. This truce evaporated at the end of World War I, and in the ensuing years courts issued numerous labor injunctions to stop strikes. *Id.*

During the Great Depression, under the New Deal Administration, President Franklin D. Roosevelt enacted the National Industrial Recovery Act of 1933 (NIRA). Pub. L. No. 73-67, 48 Stat. 195, *invalidated by Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Section 7(a) of the NIRA guaranteed employees the right to organize and bargain collectively without employer interference. NLRB: 80 Years, *supra*, at 17. In August 1933, President Roosevelt created a National Labor Board (NLB) and appointed Senator Robert F. Wagner of New York as the chairman. The NLB was composed of representatives from labor and industry and tried to resolve labor disputes through mediation and independent elections. *Id.* at 18.

The NLB, however, was "largely powerless," and in February 1935 Senator Wagner introduced the Wagner Act, or National Labor Relations Act (NLRA), which was signed into law by President Roosevelt on July 5, 1935. *Id.* at 22. Congress set forth prefatory findings and a declaration of policy at the beginning of the NLRA, which state, in pertinent part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of

> negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C.A § 151 (2018).[4]

To carry out the policy announced by Congress, the NLRA guaranteed the right of private sector workers to organize, bargain collectively, and participate in concerted activities, in order to improve their wages and working conditions. *Id.* § 157. The NLRA was immediately challenged by major industries as unconstitutional. NLRB: 80 Years, *supra*, at 26. In 1937, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, the Supreme Court found the NLRA constitutional. *Id.*

The NLRA preserves the right of private sector employees to strike, 29 U.S.C.A § 163, and provides a free speech guarantee:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Id. § 158(c).

Congress established the National Labor Relations Board (NLRB), an independent federal agency, to administer the NLRA. *Id.* §§ 153-157. The NLRB processes charges of ULPs and conducts employee secret-ballot elections based on petitions filed in its regional offices. *Id.* § 155. In order to "improve working conditions and seek industrial peace," the NLRB is armed with enforcement tools, such as the power to issue subpoenas for investigations and the power to issue "cease and desist" orders, as well as direct affirmative remedies for ULPs. *Id.* § 161.

[4] "U.S.C.A." is the abbreviation for the United States Code Annotated. The U.S.C.A. is published by Thomson Reuters and contains the general and permanent laws of the United States, as classified in the official United States Code prepared by the Office of the Law Revision Counsel of the House of Representatives. Unless otherwise noted, all citations herein to the U.S.C.A. are to the 2018 bound volume.

B. Public-Sector Collective Bargaining

Many states, including Maryland, have established a state labor relations board (or commission or agency) to regulate public-sector labor relations. *See, e.g.*, 9 A.L.R. 4th 20 *What Constitutes Unfair Labor Practice Under State Public Employee Relations Act*, Westlaw (database updated October 2019).[5] These boards define what constitutes a ULP, either directly or by cross-referencing the state labor relations act, and the state definition is generally patterned after the definition in the NLRA. 29 U.S.C.A. § 158; *see, e.g., Bd. of Educ. of Region 16 v. State Bd. of Labor Relations*, 7 A.3d 371, 382 (Conn. 2010) ("Connecticut statutes dealing with labor relations have been closely patterned after the National Labor Relations Act.").

Public-sector collective bargaining at the local level has existed in Maryland since the late 1960s. In 1968, the General Assembly enacted a comprehensive legislative scheme governing labor relations between public school employees and county boards of education. Ch. 483, 1968 Md. Laws 897. That same year, Baltimore City public employees gained the right to collectively bargain through a change to the Baltimore City Charter. Balt., Md., Municipal Employee Relations Ordinance 251 (1968).

On May 24, 1996, Governor Glendening issued *Procedures for Labor-Management Relations in the Executive Branch of State Government.* COMAR 01.01.1996.13. The EO gave to the employees of the principal departments within the Executive Branch, the Maryland

[5] Based upon an unofficial survey, the following are the regulatory boards for state labor relations: Alaska Labor Relations Agency, California Public Employment Relations Board, Connecticut Board of Labor Relations, Delaware Public Employment Relations Board, District of Columbia Board of Labor Relations, Florida Public Employees Relations Commission, Hawaii Labor Relations Board, Illinois Labor Relations Board, Indiana Education Employment Relations Board, Iowa Public Employment Relations Board, Kentucky State Labor Relations Board, Maine Labor Relations Board, Maryland State Labor Relations Board, Massachusetts Department of Labor Relations, Michigan Bureau of Employment Relations, Minnesota Bureau of Mediation Services, Montana Board of Personnel Appeals, New Hampshire Public Employee Labor Relations Board, New Jersey Public Employment Relations Commission, New Mexico Public Employee Labor Relations Board (repealed October 1, 2015); New York Labor Relations Board, Ohio State Employment Relations Board, Oklahoma Public Employees Relations Board, Oregon Employment Relations Board, Pennsylvania Labor Relations Board, Rhode Island Labor Relations Board, Vermont Labor Relations Board, Washington Public Employment Relations Commission, and Wisconsin Employment Relations Commission.

Insurance Administration, the State Department of Assessments and Taxation, and the State Lottery Agency, the "right to: (1) [o]rganize, form, join or assist any employee organization; (2) [b]argain collectively through representatives of their own choosing; (3) [e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by any other law of the State of Maryland or this Executive Order." The constitutionality of the EO was upheld by the Court of Appeals in *McCulloch v. Glendening*, 347 Md. 272 (1997), discussed in more detail below. The legislature then codified the right to collective bargaining in 1999.

C. The Collective Bargaining Law[6]

The CBL sets out the rights of employees of the State of Maryland[7] to enter into collective bargaining negotiations with the State concerning wages, hours, and other terms and conditions of employment. Md. Code Ann., State Pers. & Pens. §§ 3-101 to -603 (2015 & Supp. 2019).

The CBL defines collective bargaining, in pertinent part, as:

> (1) good faith negotiations by authorized representatives of employees and their employer with the intention of:
>
> (i) 1. reaching an agreement about wages, hours, and other terms and conditions of employment; and
>
> 2. incorporating the terms of the agreement in a written memorandum of understanding or other written understanding . . . .

Id. § 3-101(c)(1)(i) (Supp. 2019).

The CBL defines an authorized representative as "an employee organization that has been certified by the Board as an exclusive representative under Subtitle 4 of this title." *Id.* § 3-101(e).

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[6] Throughout this decision, I have cited the most current statutory law in the official Maryland Annotated Code, including the 2019 General Provisions Article and the 2019 Supplement to the 2015 Replacement Volume of the State Personnel and Pensions Article, as well as the 2019 Supplement to the 2015 Replacement Volume of the State Finance and Procurement Article. There were no changes to the substantive law in these cited provisions for the time period at issue in this case.

[7] The specific types of State employees that are subject to the Title are enumerated at Section 3-102 of the State Personnel and Pensions Article.

The CBL defines employee organization as "a labor or other organization in which State employees participate and that has as one of its primary purposes representing employees." *Id.* § 3-101(d).

Pursuant to the election procedures in the CBL, an employee organization may become certified as the exclusive representative for a particular group of State employees, known as a bargaining unit. *See id.* §§ 3-401 to -406 (2015); COMAR 14.32.03.06 (establishing the various bargaining units). Once certified, the exclusive representative is required to, *inter alia*:

> (1) serve as the sole and exclusive bargaining agent for all employees in the bargaining unit; [and]
> (2) represent fairly and without discrimination all employees in the bargaining unit, whether or not the employees are members of the employee organization or are paying dues or other contributions to it or participating in its affairs . . . .

State Pers. & Pens. § 3-407(1)-(2) (2015).

The CBL enumerates the rights of employees as follows:

> (a) Employees subject to this title have the right to:
> (1) take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities;
> (2) be fairly represented by their exclusive representative, if any, in collective bargaining; and
> (3) except as provided in §§ 3-303 and 3-305 of this subtitle, engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
> (b) An employee who is a member of a bargaining unit with an exclusive representative may, without the intervention of an employee organization, discuss any matter with the employer.

Id. § 3-301.

In addition to the rights of employees, each exclusive representative has the right to communicate with the employees that it represents. *Id.* § 3-307(a) (Supp. 2019).[8] To facilitate this communication, an exclusive representative is to be given notice by the State of a new employee program and an opportunity to participate in such a program. *Id.* § 3-307(b)-(c).

[8] The effective date for this provision was October 1, 2018. Ch. 24, 2018 Md. Laws 384, 391.

The CBL also enumerates the State's rights as follows:

> The State, through its appropriate officers and employees, has the right to:
> (1)(i) determine the mission, budget, organization, numbers, types and grades of employees assigned, the work projects, tours of duty, methods, means, and personnel by which its operations are to be conducted, technology needed, internal security practices, and relocation of its facilities; and
> (ii) maintain and improve the efficiency and effectiveness of governmental operations;
> (2) determine the:
> (i) services to be rendered, operations to be performed, and technology to be utilized; and
> (ii) overall methods, processes, means, and classes of work or personnel by which governmental operations are to be conducted;
> (3) hire, direct, supervise, and assign employees;
> (4)(i) promote, demote, discipline, discharge, retain, and lay off employees; and
> (ii) terminate employment because of lack of funds, lack of work, under conditions where the employer determines continued work would be inefficient or nonproductive, or for other legitimate reasons;
> (5) set the qualifications of employees for appointment and promotion, and set standards of conduct;
> (6) promulgate State or Department rules, regulations, or procedures;
> (7) provide a system of merit employment according to the standard of business efficiency; and
> (8) take actions, not otherwise specified in this section to carry out the mission of the employer.

Id. § 3-302 (2015).

The CBL prohibits State employees from engaging in a strike and prohibits the State from engaging in any lockout. *Id.* §§ 3-303 to -304. The CBL also prohibits the State from engaging in any ULP, including:

> (1) interfering with, restraining, or coercing employees in the exercise of their rights under this title;
> (2) dominating, interfering with, contributing financial or other support to, or assisting in the formation, existence, or administration of any labor organization;
> (3) granting administrative leave to employees to attend employer sponsored or supported meetings or events relating to an election under § 3-405 of this title, unless the employer grants employees at least the same amount of administrative leave to attend labor organization sponsored or supported meetings or employee meetings;
> (4) discriminating in hiring, tenure, or any term or condition of employment to encourage or discourage membership in an employee organization;

(5) discharging or discriminating against an employee because of the signing or filing of an affidavit, petition, or complaint, or giving information or testimony in connection with matters under this subtitle;

(6) failing to provide all employee organizations involved in an election the same rights of access as prescribed by the Board through regulation;

(7) engaging in surveillance of union activities;

(8) refusing to bargain in good faith; or

(9) engaging in a lockout.

Id. § 3-306(a) (Supp. 2019). The CBL also prohibits employee organizations from engaging in any ULP, including:

(1) interfering with, restraining, or coercing employees in the exercise of their rights under this title;

(2) causing or attempting to cause an employer to discriminate in hiring, tenure, or any term or condition of employment to encourage or discourage membership in an employee organization;

(3) engaging in, inducing, or encouraging any person to engage in a strike, as defined in § 3-303(a) of this subtitle;

(4) interfering with the statutory duties of the State or an employer;

(5) refusing to bargain in good faith; or

(6) not fairly representing employees in collective bargaining or in any other matter in which the employee organization has the duty of fair representation.

Id. § 3-306(b).

Regarding the actual process of collective bargaining, the CBL requires the parties to meet at reasonable times and engage in collective bargaining in good faith to conclude a written memorandum of understanding or other written understanding. *Id.* § 3-501(b) (2015). The CBL specifies that "[n]egotiations for a memorandum of understanding shall be considered closed sessions under § 3-305 of the General Provisions Article." *Id.* § 3-501(e). The CBL also specifies the topics for bargaining, as follows:

(a) Collective bargaining shall include all matters relating to:

(1) wages, hours, and other terms and conditions of employment . . . .

Id. § 3-502(a)(1) (Supp. 2019).

With respect to the timing of the negotiations, the CBL provides:

(c)(1) The parties shall make every reasonable effort to conclude negotiations in a timely manner for inclusion by the principal unit in its budget request to the Governor.

(2)(i) The parties shall conclude negotiations before January 1 for any item requiring an appropriation of funds for the fiscal year that begins on the following July 1.

(ii) In the budget bill submitted to the General Assembly, the Governor shall include any amounts in the budgets of the principal units required to accommodate any additional cost resulting from the negotiations, including the actuarial impact of any legislative changes to any of the State pension or retirement systems that are required, as a result of the negotiations, for the fiscal year beginning the following July 1 if the legislative changes have been negotiated to become effective in that fiscal year.

Id. § 3-501(c)(1)-(2) (2015).

The CBL also establishes a dispute resolution process, as follows:

(3)(i) If the parties do not conclude negotiations for the next fiscal year before October 25, either party may request that a fact finder be employed to resolve the issues.

(ii) The fact finder shall be employed no later than November 1.

(iii) A fact finder shall be a neutral party appointed by alternate striking from a list by the parties provided:

1. by the Federal Mediation and Conciliation Service; or

2. under the Labor Arbitration Rules of the American Arbitration Association.

(iv) The fact finder:

1. may give notice and hold hearings in accordance with the Administrative Procedure Act;

2. may administer oaths and take testimony and other evidence;

3. may issue subpoenas; and

4. before November 20, shall make written recommendations regarding wages, hours, and working conditions, and any other terms or conditions of employment that may be in dispute.

(v) The written recommendations of the fact finder shall be delivered to the Governor, the exclusive representative, the President of the Senate, and the Speaker of the House of Delegates by the Secretary on or before December 1.

Id. § 3-501(c)(3).

If an agreement is reached between the parties, the CBL includes the following related to the agreement:

> (d)(1) A memorandum of understanding that incorporates all matters of agreement reached by the parties shall be executed by the exclusive representative and:
>
> (i) for a memorandum of understanding relating to the State, the Governor or the Governor's designee;
>
> (ii) for a memorandum of understanding relating to a system institution, the president of the system institution or the president's designee; and
>
> (iii) for a memorandum of understanding relating to Morgan State University, St. Mary's College of Maryland, or Baltimore City Community College, the governing board of the institution or the governing board's designee.
>
> (2) To the extent these matters require legislative approval or the appropriation of funds, the matters shall be recommended to the General Assembly for approval or for the appropriation of funds.
>
> (3) To the extent matters involving a State institution of higher education require legislative approval, the legislation shall be recommended to the Governor for submission to the General Assembly.

Id. § 3-501(d).

The CBL, unlike the NLRA, does not contain a free speech guarantee.

D. The State Labor Relations Board

The SLRB is an independent unit of State government with responsibility for administering and enforcing the CBL. *Id.* §§ 3-201, 3-205(a) (2015 & Supp. 2019). The SLRB may investigate and take appropriate action in response to complaints of ULPs. *Id.* § 3-205(b)(3) (Supp. 2019); *see also* COMAR 14.32.01.02B(2) (providing that the powers and duties of the SLRB include adjudicating ULP complaints and fashioning appropriate remedial relief for violations of the CBL). The SLRB is required to adopt and enforce regulations to carry out the CBL. State Pers. & Pens. § 3-206 (2015).

The SLRB's regulations are at Title 14, Subtitle 32 of COMAR. Under the regulations, a party alleging a ULP, as defined in Section 3-306 of the State Personnel and Pensions Article, may request relief from the SLRB by filing a complaint with the Executive Director, within ninety days of knowledge of the occurrence. COMAR 14.32.05.01A. Once submitted, the

Executive Director of the SLRB is empowered to determine whether probable cause exists to believe that the alleged ULP has occurred. COMAR 14.32.05.02G-H.

Only the ULP specified in the complaint shall be considered in a proceeding before the SLRB or the OAH. COMAR 14.32.05.02J. The filing party has the burden of proof by a preponderance of the evidence. COMAR 14.32.05.02K. If the SLRB finds a ULP has been or is being committed, the SLRB shall take the action that it deems necessary to remedy the ULP including:

> (1) Issuing a cease-and-desist order;
> (2) Requiring a party to make reports from time to time showing the extent of compliance with the Board's order or ruling;
> (3) Reinstatement;
> (4) Communicating directly with employees about their rights; and
> (5) Such further action as the Board may require.

COMAR 14.32.05.02L.

The SLRB regulations also imposes certain requirements related to collective bargaining negotiations, as follows:

> The designated representatives of the employer and of the exclusive representative shall:
>
> A. Establish ground rules for negotiations;
> B. Identify the participants for negotiations;
> C. Establish the amount of release time for negotiating;
> D. Set a tentative schedule and agenda for negotiations; and
> E. Establish any other matter considered pertinent and necessary before beginning any other negotiation activities.

COMAR 14.32.06.01. The SLRB regulations do not define "ground rules."

The SLRB regulations provide a detailed set of requirements related to ratification of a memorandum of understanding by employees in a bargaining unit. The regulations specify that, at the close of collective bargaining negotiations, the exclusive representative shall promptly present the proposed agreement to the employees in the bargaining unit for consideration and ratification, and shall conduct the ratification vote through either a ratification meeting or a mail

in ballot. COMAR 14.32.06.03A. The exclusive representative is required to give notice of the ratification process to all employees in the bargaining unit, sufficiently in advance of the ratification vote to permit the employees in the bargaining unit a reasonable opportunity to consider the matters to be voted upon. COMAR 14.32.06.03B. The notice shall be communicated to the employees in the bargaining unit by any means that may reasonably be expected to come to the attention of the employees in the bargaining unit, including but not limited to the following:

> (1) Posting in conspicuous places where notices to employees in the bargaining unit are customarily posted, including but not limited to posting on the exclusive representative's website;
> (2) Personal delivery to the employees in the bargaining unit;
> (3) Delivery through interoffice mail;
> (4) Mailing to the employees in the bargaining unit;
> (5) Advertisement in an employee newsletter distributed to the employees in the bargaining unit or in a newspaper of general circulation in the community where the employees in the bargaining unit are employed; or
> (6) Electronic mailing to the employees in the bargaining unit.

Id. The tally shall be open to all employees in the bargaining unit regardless of membership in the employee organization. COMAR 14.32.06.03K. The majority of votes cast by all those voting shall prevail. COMAR 14.32.06.03N.

III. Analysis

A. Ground Rules Generally

Ground rules are intended to facilitate bargaining over mandatory subjects of bargaining. *See, e.g., In re New Milford & Local 361*, No. 3837, 2001 WL 35807643, at *3 (Conn. Bd. of Labor Relations Sept. 7, 2001). Ground rules cover procedural, rather than substantive, topics. *See AFSCME v. Ehrlich*, SLRB ULP Case No. 05-U-01, 2005 WL 6193427, at *7 (Mar. 11, 2005). Ground rules cover the mechanics of negotiating, including such topics as scheduling, bargaining team composition, the exchange of proposals, leave time for bargaining unit

members, and information sharing. *IAFF Local 1650, Augusta Fire Fighters v. City of Augusta*, No. 11-03, 2011 WL 13290393, at *8 (Me. Labor Relations Bd. Dec. 15, 2011).

The Supreme Court has held that:

> [T]he obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment" . . . is limited to those subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (citation omitted).

Following this precedent, the Fourth Circuit has held that an employer's insistence on changes to the composition of the employees' bargaining unit as a precondition to mandatory subjects of bargaining was a ULP. *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 602 F.2d 73, 76 (4th Cir. 1979). The court stated:

> [T]he duty to bargain extends only to "wages, hours, and other terms and conditions of employment" as specified by [section 8(d), 29 U.S.C. § 158(d), of the NLRA], and insistence upon agreement as to non-mandatory subjects of bargaining has been construed by the Supreme Court as a refusal to bargain about mandatory subjects in violation of [section] 8(a)(5). The description of the bargaining unit is not a mandatory subject of bargaining.

Id. (citations omitted). In keeping with the above precedent, the SLRB has held that an employer cannot condition its obligation to bargain on reaching an agreement on non-mandatory subject matters such as procedural ground rules. *Ehrlich*, 2005 WL 6193427, at *7.

Here, the ground rules in question undoubtedly deal with non-mandatory subject matters because they are procedural in nature and are an attempt to regulate the parties conduct during the course of negotiations. Therefore, AFSCME was free to bargain or not to bargain over the ground rules. The State could not insist that AFSCME agree to non-mandatory subjects of bargaining.

B. Disputed Ground Rule: Communications with the General Assembly

AFSCME argues that the State seeks to inhibit and restrain the constitutional rights of AFSCME and its members, and that these rights cannot be waived under the circumstances presented. AFSCME argues that the State has not offered any compelling justification for the restraint of its constitutional rights. AFSCME avers that it has for decades lobbied the General Assembly on an annual basis on all sorts of issues pertaining to State employees. AFSCME argues that the General Assembly has continued to consider legislative changes related to issues subject to collective bargaining even after passage of the CBL. AFSCME argues that the duty of fair representation requires it to advocate before the legislature for improvements to working conditions for State employees.

The State argues that permitting AFSCME to speak to the legislature is antithetical to the purpose of collective bargaining. The State argues that the 2017 MOU provision limits AFSCME's ability to petition the legislature on mandatory subjects of bargaining. The State argues that AFSCME's refusal to agree to the ground rule constitutes a refusal to bargain in good faith.

Findings of Fact 97, 107, and 112-125 inform the discussion below.

1. Petitioning the Government

Our republican government is built on the premise that every citizen has the right to engage in political expression and association. U.S. Const. amend. I; *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). To that end, the First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition the government for redress of grievances. *Smith v. Arkansas State Highway Emps., Local 315*, 441 U.S. 463, 464 (1979). These rights are protected against state action by the Fourteenth Amendment. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264-65, 277 (1964). Freedom

of speech and the right to petition the government for redress of grievances is also protected by the Maryland Declaration of Rights. Md. Const. Decl. of Rights art. 13, 40.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Constitution. *Id.* The Constitution also protects the right of associations to engage in advocacy on behalf of their members. *Smith*, 441 U.S. at 464.

Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, or by imposing sanctions for the expression of particular views it opposes. *Smith*, 441 U.S. at 464. Nor can it compel the disclosure of a person's political associations. *Sweezy*, 354 U.S. at 250.

Thus, the Supreme Court has found the efforts of a union official to organize workers to be constitutionally privileged. *Thomas v. Collins*, 323 U.S. 516 (1945). The Maryland Court of Appeals has held that "it is clear beyond peradventure that public employees have a First Amendment right to promote, associate with, and be represented by labor unions." *Charles Cty. Supporting Servs. Emps. Local Union 301 v. Bd. of Ed. of Charles Cty.*, 48 Md. App. 339, 340-41 (1981); *see also Alabama*, 357 U.S. at 460. And the Supreme Court has concluded that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy*, 354 U.S. at 250-51.

In *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court squarely addressed the question of whether union speech in collective bargaining is a matter of public

concern, concluding that union speech in collective bargaining, since it pertains in part to how public money is spent, is "overwhelmingly of substantial public concern." *Id.* at 2477. When unions speak out on matters of "profound value and concern to the public," union speech in collective bargaining "occupies the highest rung of the hierarchy of First Amendment values and therefore merits special protection." *Id.* at 2476 (internal quotation marks omitted).

The Supreme Court commented on the interrelation between the constitutional right to freedom of speech and the constitutional right to petition the government for a redress of grievances in *Duryea v. Guarnieri*, 564 U.S. 379 (2011). In *Guarnieri*, the Court stated:

> It is not necessary to say that the two Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are "cognate rights." "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.

Id. at 388 (citations omitted).

Layered on top of these bedrock constitutional rights is the right to collectively bargain. The Constitution, however, does not impose an affirmative obligation on public employers to recognize, bargain with, or otherwise respond to employee organizations. *Charles Cty. Supporting Servs. Emps. Local Union 301*, 48 Md. App. at 340-41.

Ms. Kollner stated that it was never the intent of the State to impair the ability of individual bargaining unit members to communicate with the legislature. This makes sense, since the proposed language only binds "the parties," i.e., AFSCME and the State. However, she then went on to say that, under the proposed ground rule, a bargaining unit member could speak

to the General Assembly as an individual but could not invoke AFSCME's name or "bring the full legislative authority" of AFSCME into discussions with the legislature or legislators. This raises constitutional concerns regarding the impact of the ground rule on AFSCME's members and their freedom, as individuals, to associate.

2. Working Conditions of State Employees

The right to collectively bargain was first granted to Executive Branch employees by a 1996 EO issued by Governor Glendening. In *McCulloch v. Glendening*, 347 Md. 272 (1997), the Court of Appeals concluded that the Governor had not violated the separation of powers doctrine or exceeded his statutory powers when he issued the EO. The petitioners in *McCulloch* were concerned that Governor Glendening had sidestepped the legislature to impose the collective bargaining requirement by EO. The petitioners argued in part that the EO conflicted with the labor-management scheme adopted by the General Assembly in the enactment of the State Personnel Management Reform Act of 1996. Governor Glendening had established, by Executive Order, a task force to review the statutes governing the State Personnel Management System and recommend improvements. EO 01.01.1995.15 (June 9, 1995). The Task Force recommendations were introduced as the Act and made major changes and additions to the State Personnel and Pensions Article, including a new requirement that State agencies establish employee/management teams to discuss workplace issues. *W. Corr. Inst. v. Geiger*, 371 Md. 125, 145-46 (2002). The petitioners argued that the employee/management teams and the bargaining units envisioned by the EO were incompatible; the court disagreed and held that they could coexist and thus that the EO did not conflict with the Act. *McCulloch*, 347 Md. at 290-91. The court also concluded that "[n]one of the provisions of the [EO], not one, makes or purports to make any agreement reached through the collective bargaining process conducted by

subordinate administrative officials legally binding or to divest the Governor, General Assembly or other public officer of discretion given them by law." *Id.* at 292.

McCulloch shows that the General Assembly actively legislated with respect to State employee working conditions prior to the enactment of the CBL and that the General Assembly's exercise of its law-making power in this area could co-exist with a collective bargaining scheme. The text of the CBL indicates the legislature's intent to remain active and preserve its law-making prerogative with respect to the working conditions of State employees. For example, the CBL states that: "This title and any agreement under this title do not limit or otherwise interfere with the powers of the Governor or the Maryland General Assembly under Article III, § 52 of the Maryland Constitution."[9] State Pers. & Pens. § 3-103 (2015). The CBL also requires that matters requiring legislative approval or the appropriation of funds must be recommended to the General Assembly. *Id.* § 3-501(d)(2). The CBL states that the State shall not be required to negotiate over any matter that is inconsistent with State law; instead, the parties may negotiate only if it is understood that an agreement cannot become effective unless the General Assembly amends the law in question. *Id.* § 3-502(c) (Supp. 2019). The CBL even requires that, in the event of an impasse in negotiations, a copy of the written recommendations of a fact finder shall be sent to the President of the Senate and the Speaker of the House of Delegates. *Id.* § 3-501(c)(3)(v) (2015).

Separate and apart from the actual words of the statute, the clearest indication that the General Assembly intended to retain its law-making power with respect to the working conditions of State employees is found in the uncodified language from House Bill 179, which became the CBL. The uncodified language states, in part, "SECTION 7. AND BE IT

[9] Article III, Section 52 of the Maryland Constitution imposes certain requirements pertaining to the budget process on the General Assembly and the Governor and requires the General Assembly to appropriate money from the State Treasury only in accordance with those requirements.

FURTHER ENACTED, That the General Assembly reserves the right to change or modify the law with regard to any matter that is the subject of a memorandum of understanding executed in accordance with Section 2 of this Act, regardless of whether the change or modification would become effective during the term of the memorandum of understanding." Ch. 298, 1999 Md. Laws 2195, 2215. I cannot imagine a clearer expression of legislative intent than this.

Not surprisingly, the General Assembly has continued to introduce and pass laws that not only alter the CBL but also pertain more specifically to State employee working conditions. And AFSCME has continued to exercise its constitutional right to petition the General Assembly for changes to the law that would benefit its employees, in keeping with its duty of fair representation. State Pers. & Pens. §§ 3-407(2), 3-306(b)(6) (2015 & Supp. 2019).

3. Good Faith Bargaining

Rather than squarely address the legislative history and the serious constitutional questions raised by its proposed ground rule, the State argues that "good faith bargaining requires both sides to discuss proposed changes to mandatory subjects of bargaining before going to the legislature." It has not offered any legal authority to support this extremely broad proposition. The closest the State comes to offering legal authority is by reference to the 2005 *Ehrlich* case, specifically the SLRB's conclusion that "negotiating in good faith requires each party to negotiate bilaterally with the other party's authorized representative." 2005 WL 6193427, at *7. It also cites to a treatise covering public sector bargaining that states:

> It is when lobbying takes on the look of an end run that certain activities are questioned . . . . The end run, if successful, can result in a union winning from the legislative body what it has been denied at the bargaining table. The tactic is inimical and chilling to collective bargaining, making future negotiations more problematic and undercutting management authority.

Richard Kearney, *Labor Relations in the Public Sector* 149 (2d ed. 1992). Notably, the author did not conclude that lobbying the legislature is *per se* a lack of good faith. That is because an

allegation of a lack of good faith is best viewed in hindsight, and in context. The Maryland Court of Appeals has explained the good faith standard as follows:

> The task in applying the good faith standard is to distinguish, upon the facts of each case, between a party genuinely participating in negotiations, listening to and evaluating proposals made by the other side and attempting to explain its own position, with a willingness to persuade and be persuaded, and a party merely "going through the motions" with a "predetermined resolve not to budge from an initial position."

Montgomery Cty. Council of Supporting Servs. Emps., Inc. v. Bd. of Educ. of Montgomery Cty., 277 Md. 343, 350 (1976) (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)); *see also id.* at 349 ("The requirement of good faith is a subjective measure which can be applied only in light of the totality of the circumstances.").

Other state courts have also elaborated upon the good faith standard in negotiations and have also adopted the totality of the circumstances analytic framework to determine what constitutes good faith. *See, e.g., Bd. of Educ. of Thomaston v. State Bd. of Labor Relations*, 584 A.2d 1172 (Conn. 1991) ("The 'duty to bargain in good faith' is a term of art in labor law. It is an ongoing duty that continues after initial contract negotiations are over. . . . 'Going through the motions' does not fulfill the duty to bargain in good faith. Thus, failing to provide the other party with relevant information during the collective bargaining process or at other times; failing to make contract proposals in good faith; and failing to bargain before making unilateral changes in terms and conditions of employment after a contract has been signed have all been described as breaches of the duty to bargain in good faith. These types of conduct have one thing in common: they are attempts to evade the statutorily mandated collective bargaining process." (citations omitted)); *Sch. Comm. of Newton v. Labor Relations Comm'n*, 447 N.E.2d 1201, 1211 (Mass. 1983) ("'Good faith' implies an open and fair mind as well as a sincere effort to reach a common ground . . . . The quality of the negotiations is evaluated by the totality of conduct."); *Am. Fed'n of Teachers v. Ledbetter*, 287 S.W.3d 360, 367 (Mo. 2012) (finding that right to

bargain collectively "inherently includes the obligation that public employers act in good faith because otherwise public employers could act with the intent to thwart collective bargaining so as never to reach an agreement, frustrating the very purpose of bargaining and invalidating the right").

In summary, a determination as to good faith is best made after the fact and based on the entirety of the conduct of the parties during negotiations; importantly, how the parties conduct themselves at the bargaining table. The case law from Maryland, other states, and from the NLRB does not support the sort of categorical argument offered by the State: if you talk to the legislature during negotiations about a mandatory bargaining subject during negotiations, then it is automatically a violation of the good faith standard.

Even when labor boards in other states have addressed the question, utilizing the totality of the circumstances test, the conclusion has been that the exercise of constitutional rights by the union and its employees does not constitute a lack of good faith. Perhaps the best example is a Board of Labor Relations case from Connecticut. *In re Int'l Bhd. of Police Officers, Local 731 & Conn., Judicial Branch*, No. 4334, 2008 WL 4095793 (Conn. Bd. of Labor Relations Aug. 21, 2008). The Judicial Branch filed a complaint with the Connecticut State Board of Labor Relations alleging that the union violated the State Employee Relations Act by failing to bargain in good faith when it sent a letter to the Governor and Attorney General during the middle of negotiations to seek their intervention on issues relating to collective bargaining. *Id.* at *1-2. The Judicial Branch made many of the same arguments advanced by the State in support of its ground rule restricting AFSCME's communication to the General Assembly: that the union had improperly bypassed the collective bargaining requirement, that its actions amounted to an attempt to coerce the Judicial Branch, and that it was attempting to bargain with the Executive Branch rather than the Judicial Branch. *Id.* at *7. The union argued that its letter to the

Governor and Attorney General was protected by the First Amendment, and the Board agreed. *Id.* In its analysis the Board looked at a prior case in which the Board had upheld the Executive Branch's right to have the Connecticut General Assembly change the law and impose its position in pension negotiations on several bargaining units. *Id.* at *9. The Board dismissed the Judicial Branch's argument that the case was distinguishable by noting that "[w]hile it is true that here, the Union's end run attempt was made on members of the Executive Branch, the Union has every right to petition its government for redress . . . . [W]e believe that grave constitutional difficulties would result from any state law that purported to prohibit the exercise of this right." *Id.* The Board concluded:

> [W]e find the evidence to be clear that the Union was not attempting to bargain with the Executive Branch regarding its concerns. Rather, the Union sought redress through the political process to Connecticut's duly elected Chief Executive and Chief Legal Officer to influence matters it was unable to directly achieve through the preferable means of collective bargaining.

Id. at *10.

The grave constitutional difficulties spoken of in the Connecticut case are certainly at play here and are not just limited to AFSCME's First Amendment rights—the ground rule also raises separation of powers concerns. If talking to the General Assembly during negotiations is a per se ULP as the State asserts, then the General Assembly and its members would be complicit in any such violation. The progress of this case demonstrates the problems that the ground rule presents.

4. Legislative Privilege

The State propounded the following discovery request to AFSCME:

> All documents (including ESI) which embody, concern, relate, refer, reflect or pertain in any way to communications you had with any member of the General Assembly from September 2018 through April 2019 concerning topics and/or legislation, proposed or otherwise, related to mandatory subjects of collective bargaining (i.e., wages, hours and other terms and conditions of employment) for the bargaining unit members you represent.

This request prompted the General Assembly to intervene in this matter in order to claim that the requested documents are protected by legislative privilege. The intervention motion was granted, and the General Assembly's counsel was present at the six hearing dates, except for the final day, during which the parties made closing arguments.

Legislative privilege evolved over time from its original form of immunity from suit to an evidentiary and testimonial privilege. *See* Md. Const. Decl. of Rights art. 10; *Montgomery Cty. v. Schooley*, 97 Md. App. 107, 118 (1993); *Mandel v. O'Hara*, 320 Md. 103, 111-12 (1990). The privilege is intended to protect legitimate legislative activity from scrutiny by the judicial or executive branches, thereby protecting the independence of the legislature and reinforcing the core doctrine of separation of powers. *Schooley*, 97 Md. App. at 114. While reserving judgment on the merits of the General Assembly's argument that legislative privilege applied to the documents, I concluded that the General Assembly had articulated an interest relating to the subject matter of the hearing, since the requested documents would pertain to core legislative conduct, namely communications with third parties regarding potential legislation. *See, e.g., id.* at 123; *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016) (holding emails between legislators and third parties, some of which referenced draft legislation, were created in connection with bona fide legislative activity); *Jewish War Veterans of the U. S. A., Inc. v. Gates*, 506 F. Supp. 2d 30, 56-57 (D.D.C. 2007) (holding that the acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege). I further concluded that the General Assembly's interest in preserving its legislative privilege would be adversely affected by an order compelling the disclosure of the documents. *See United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (holding evidentiary privilege constitutes a legal interest and can be directly lost through the operation of a discovery order). Finally, I concluded that the General Assembly's

interests were not adequately protected by the parties to this action, since only an individual legislator or the General Assembly can assert legislative privilege. *Schooley*, 97 Md. App. at 120-22.

If I accept the State's position, then what occurred in this case could become a regular occurrence. In order to prove that AFSCME violated the ground rule, the State would need to show by documentary evidence or through testimony that AFSCME had communicated with the General Assembly during collective bargaining. Any attempt by the State to bring a ULP complaint for a violation of the proposed ground rule would necessarily require the intervention of the General Assembly to preserve the privilege. This is exactly the type of situation that the Speech and Debate Clause and the associated privilege are designed to prevent.

5. Waiver

The State argues that the 2017 MOU provision limits AFSCME's ability to petition the legislature on mandatory subjects of bargaining, and that AFSCME had violated this provision during the 2018 legislative session. I disagree and conclude that the MOU did not restrict AFSCME's legislative activity in the manner that the State argues, and therefore that AFSCME did not violate the MOU provision when it supported two bills during the 2018 legislative session.

The 2017 MOU restricts the parties' ability to "seek statutory changes in working conditions that are mandatory subjects of bargaining when such changes have not been subject to the bargaining process described in . . . Article [33]." However, the sentence immediately preceding the above sentence refers to "Employer initiated changes." Working conditions are not defined in Article 33 or elsewhere in the MOU, but in Article 5 (Labor Management Committees), the term "working conditions" is used and illustrative examples are given such as scheduling practices, career paths for employees, and transportation. The bargaining process

described in Article 33 creates a process that appears to be entirely separate from the process described in the CBL and pertains only to employer-initiated changes to working conditions during the two years following execution of the MOU.

Because the obligation to bargain regarding changes to working conditions is limited to employer-initiated changes, the MOU does not limit AFSCME's ability to seek statutory changes to working conditions that have not been subject to employer-initiated changes. To argue otherwise is to ignore the plain language of the MOU and specifically the reference to "the bargaining process in . . . Article [33]," which is clearly for employer-initiated changes. The 2017 MOU also does not limit AFSCME's ability to seek statutory changes related to wages, which is clearly what the ground rule language is intended to do.

The State argued that AFSCME's support of two bills during the 2018 legislative session constituted violations of the 2017 MOU provision discussed above. Since I conclude that the restriction in the 2017 MOU only applies to working conditions that have been subject to employer-initiated changes, AFSCME did not violate the 2017 MOU. Thus, AFSCME's past conduct in the legislature provides no basis for the State's proposed ground rule.

In conclusion, the State's proposed ground rule restricting the parties' ability to seek statutory changes impairs activity that is protected by the First Amendment and by the CBL to the detriment of not just AFSCME but 17,000-plus State employees. It is not justified based on the 2017 MOU or any conduct by AFSCME that is in the record. It would unduly restrain the operation and invade the province of a separate and coequal branch of government. And, most importantly for the disposition of the questions presented in this case, the ground rule is procedural in nature and does not concern a mandatory subject matter for collective bargaining. Therefore, while the State could introduce the ground rule, AFSCME was under no obligation to agree to it, and its failure to agree to it does not constitute a lack of good faith. On the other

hand, the State's insistence that AFSCME agree to the ground rule before the State would begin bargaining constitutes a refusal to bargain in good faith about wages in violation of the CBL.

C. Disputed Ground Rule: Communications Using Webpage and Social Media

AFSCME argues that the ground rule restricting its webpage and social media communication runs counter to the rights guaranteed in the CBL; specifically, the right to communicate with the employees it represents. AFSCME argues that communication regarding the status of collective bargaining is an essential component of its job, as is hearing from and responding to its covered employees. AFSCME argues that social media is a commonplace communication tool and an expected means of communication. AFSCME argues that it has a legal duty to all the employees it represents, even those that are not members of the union.

The State argues that the CBL prohibits any communication to the public regarding the status of negotiations. The State argues that communication on a publicly-accessible website and on social media constitutes communication with the public. The State argues that AFSCME should be compelled to utilize non-public methods of communication to communicate with the employees it represents about the status of negotiations.

Findings of Fact 5, 7, 30-76, 80-84, 86, 88-96, 105-106, 109, 111, and 113-121 inform the discussion below.

1. Freedom of Speech

When public employee speech involves matters of public concern, that speech is entitled to the highest level of protection. *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 571-72 (1968); *Bland v. Roberts*, 730 F.3d 368, 387 (4th Cir. 2013). When a workplace prohibition extends to employee speech regarding issues of public concern, the employer must show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that

expression's necessary impact on the actual operation of the Government." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995) (internal quotation marks omitted). The First Amendment also protects the right of individuals to receive information. Freedom of speech is afforded to the communication, to both its source and recipients. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

In *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 321-22 (2012), the Court stated: "Public-sector unions have the right under the First Amendment to express their views on political and social issues without government interference." *See also Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (footnote omitted); *see id.* ("[The worth of speech] does not depend upon the identity of its source, whether corporation, association, union, or individual.")

Since the *Citizens United* decision, the Supreme Court has highlighted the First Amendment rights of public-sector labor unions while elaborating upon the First Amendment rights of *nonmember* employees regarding the union's collection of special assessments or union dues. In *Knox*, the Court stated that the "First Amendment . . . does not permit a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining." *Id.* at 302-03; *see also Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2460 (2018) (holding that Illinois, under the Illinois Public Labor Relations Act, violated public employees' First Amendment free speech rights by compelling nonmembers of public union to pay a percentage of union dues thereby "subsidiz[ing] [union] speech on matters of substantial public concern").

The Supreme Court has declined to treat online speech differently from other types of speech; instead, it has decided that online speech is entitled to the same level of protection from government interference. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 824 (1997). Thus, the First Amendment protects public-sector employee social media speech, and "many public employees have broader protections for social networking than their private sector counterparts because of statutory and constitutional protections applicable only to the government workplace." William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. Ky. L. Rev. 427, 434 (2013); *see also* Gregory A. Hearing & Jeffery L. Patenaude, *The Times Are Still a Changing: Technology's Continued Impact on Labor and Employment Law*, 90-JAN Fla. B.J. 57, 58 (2016).

In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), the Court of Appeals for the Fourth Circuit was asked to determine the constitutionality of a social media policy that prohibited in sweeping terms the dissemination of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees." *Id.* at 404. The court held that the policy was unconstitutional because it "squashes speech on matters of public import at the very outset." *Id.* at 408. The court based its holding on its conclusion that the interests of present and future employees and their potential audiences in such speech is "manifestly significant." *Id.* The court stated:

> [S]ocial networking sites like Facebook have also emerged as a hub for sharing information and opinions with one's larger community. And the speech prohibited by the policy might affect the public interest in any number of ways, including whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned. The Department's law enforcement policies could well become a matter of constructive public debate and dialogue between law enforcement officers and those whose safety they are sworn to protect. After all, "[g]overnment employees are often in the best position to know what ails the agencies for which they work."

Id. (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). The court rejected the City's argument that social media use could undermine the police department's interest in maintaining camaraderie and building community trust, finding that the City presented no evidence of any material disruption arising from any officer's comments on social media. *Id.*

2. Statutory Rights

In addition to the constitutional rights discussed above, the CBL grants certain statutory rights to unions and employees. The CBL gives employees the right to take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities; to be fairly represented in collective bargaining; and engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. State Pers. & Pens. § 3-301(a)(1)-(3) (2015). The CBL protects these rights by making it a ULP for the State to, among other things, interfere with, retrain, or coerce employees in the exercise of their CBL rights; or interfere with any labor organization. *Id.* § 3-306(a)(1)-(2) (Supp. 2019).

During the 2018 legislative session, the General Assembly passed House Bill 1017, cross-filed as Senate Bill 677. The floor report for HB1017 notes that the bill alters existing requirements related to the provision of State employee information to exclusive bargaining representatives "for the purpose of increasing membership in an employee organization." The bill added a provision to Section 3-307 that states, "Each exclusive representative has the right to communicate with the employees that it represents." State Pers. & Pens. § 3-307(a) (Supp. 2019).

The bill file for HB1017 contains the written testimony from Delegate Marc Korman, the bill sponsor. Delegate Korman notes that the legislation was necessary because of a forthcoming Supreme Court decision (the *Janus* case discussed above) that was likely to revoke a public employee union's ability to obtain a fee from nonmembers for the services provided by the

union. Delegate Korman notes that providing contact information and the ability to address new employees during orientation would ensure that unions are able to carry out their functions, which include listening to the priorities of the individuals they represent and communicating vital information such as the status of collective bargaining negotiations.

DBM and other State agencies opposed the bill, particularly the provisions expanding the requirement that the State provide State employee contact information to exclusive representatives. Although amendments were offered on these and other provisions in the bill, no amendments were offered to remove or otherwise amend the exclusive representative's right to communicate with the employees it represents. Thus, the clear legislative intent is that an exclusive representative such as AFSCME shall have the right to communicate to nonmembers, including regarding the status of bargaining.

3. Speech Cases under the NLRA

Federal cases under the NLRA are instructive regarding the contours of the communication rights enumerated in the CBL. The language in the NLRA is identical to that of the CBL in guaranteeing private sector employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C.A. § 157. In addition, the NLRA contains a free speech guarantee. *Id.* § 158(c).

Shortly after the enactment of the NLRA, the Supreme Court stated:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the

> effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

Thornhill v. Alabama, 310 U.S. 88, 102-103 (1940).[10]

In the ensuing years, the Supreme Court and the federal Courts of Appeals have elaborated upon the scope of protected communications under the NLRA in numerous opinions. *See, e.g., Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966) ("[T]he enactment of [section 158(c)] manifests a congressional intent to encourage free debate on issues dividing labor and management . . . . [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. " (footnote omitted)); *Old Dominion Branch N. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) ("The freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB . . . . The [NLRB] has given frequent consideration to the type of statements circulated during labor controversies, and . . . it has allowed wide latitude to the competing parties." (internal quotation marks omitted)).

More recently, in *Healthbridge Mgmt., LLC v. NLRB*, 798 F.3d 1059 (D.C. Cir. 2015), the United States Court of Appeals for the District of Columbia Circuit decided whether there was substantial evidence to support the NLRB's orders upholding the wearing of union stickers and posting of union flyers in a healthcare setting. The case began when nursing home management and a health care union were "engaged in a contentious renegotiation" of its collective bargaining agreements. *Id.* at 1064. After a regional office of the NLRB issued a complaint against the management that it had unfairly terminated employees, the union posted notices on its union bulletin board that management had been "busted" for violating federal labor law. *Id.* at 1063. Some employees wore "busted" stickers in the nursing homes. *Id.* Management removed the flyers and ordered the employees to remove the stickers while working in patient care areas. *Id.*

[10] The Supreme Court addressed speech and labor relations, but the case was not brought under the NLRA.

The court concluded there was substantial evidence to support that the ban on the stickers and removal of the flyers interfered with employees' rights under the NLRA. *Id.* at 1070, 1073. The court based its conclusion on the fact that the stickers were not "objectively disturbing" or presented a likelihood that patients would be harmed, that the union's flyers were a "protected union communication," and that unless union bulletin board notices are not "directly related to activities protected by the [NLRA] and are . . . so egregious as to be considered indefensible," the notices are protected even if "abusive" or "insulting." *Id.* at 1071-1072, 1074-75.

4. Speech Cases from Other State Courts

A number of state courts have reviewed the scope of protected communications in public-sector labor relations and have affirmed that unions—and employers if not coercing, intimidating, or promising a benefit—enjoy wide latitude when communicating, including regarding the status of collective bargaining. *Bd. of Educ. of Region 16 v. State Bd. of Labor Relations*, 7 A.3d 371, 383 (Conn. 2010) (finding the NLRA to be of "great assistance and persuasive force in the interpretation of [its] acts" and stating that under the NLRA an "employer may speak freely to its employees about a wide range of issues including the status of negotiations" if speaking in "noncoercive" terms (internal quotation marks omitted)); *Duval Cty. Sch. Bd. v. Fla. Pub. Emps. Relations Comm'n*, 363 So. 2d 30, 33 (Fla. Dist. Ct. App. 1978) (finding that union's distribution of leaflets and flyers, including a mock "wanted" poster with a picture of the school superintendent captioned "wanted at the bargaining table," is protected by the First Amendment and Florida labor statutes); *S. Worchester Cty. Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n*, 389 N.E.2d 389, 392-93 (Mass. 1979) (holding that it would not consider lower court's "findings," that were not implemented in a dispute arising from a breakdown in negotiations, that union's "disruption of school committee meetings and picketing" to persuade school committee to resume negotiations was "childish" and "immature" but finding

substantial evidence to support Commission's finding that employer interfered with employee rights by ordering union to remove "inoffensive" union literature from teacher mailboxes); *In re City of Portsmouth, Bd. of Fire Comm'rs*, 667 A.2d 345, 346, 348 (N.H. 1995) (resolving on nonconstitutional grounds and finding that fire commissioner's criticism of union leadership in local newspaper for releasing part of union member's personnel file "did not contain elements of intimidation, coercion, or misrepresentation" nor demonstrated interference); *In re Town of Hampton*, 908 A.2d 151, 154-55 (N.H. 2006) (holding that chief of police's posting of a response to union president's email on official bulletin board, after bargaining session between town and police union, was not "direct dealing" with union members and "promised no future benefit" and "mere act of communication by an employer with its employees is not a *per se* unfair labor practice under the [labor statute]"); *Crowfoot Elementary Sch. District No. 89 v. Pub. Emp. Relations Bd.*, 529 P.2d 405, 405-07 (Or. Ct. App. 1974) (holding that public employee labor association did not commit ULP by "directly communicat[ing] during the period of negotiations with officials other than those designated to represent the employer" when district teachers, who were members of association, attended or otherwise lawfully participated in school district budget meeting open to the public); *Eric Cty. Technical Sch. v. Pa. Labor Relations Bd.*, 169 A.3d 151, 159, 162 (Pa. Commw. Ct. 2017) (holding that school did not fail to bargain in good faith with union when school sent memorandum directly to union members because memorandum was "innocuous" and not a "veiled threat of reprisal" or coercive); *but see Int'l Bhd. of Teamsters, Local 700 v. Ill. Labor Relations Bd.*, 73 N.E.3d 108, 128-29 (Ill. App. Ct. 2017) (holding that employer's social media policy stating that all rules of conduct apply when engaging in Internet activity on and off-duty "does not explicitly prohibit protected activity" and "the possibility that employees could interpret the policy that way is not enough" to be a ULP).

5. The Closed Session Provision in the Collective Bargaining Law

The State argues that the CBL prohibits any communication to the public regarding the status of negotiations. In support of this proposition, the State points to the provision in the CBL making the negotiating sessions closed sessions under the Open Meetings Act.

It is clear from the above cases that the speech sought to be restricted by the State is protected by the Constitution. The question then becomes how to reconcile the closed session provision of the CBL with the Constitution. Secondarily, there is a question of how to reconcile the closed session provision of the CBL with the statutory right to communicate enumerated in the CBL.

The cardinal principal of statutory construction is to save and not destroy. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Between two possible interpretations of a statute, by one of which it would be unconstitutional or of doubtful constitutionality and by the other valid, the plain duty is to adopt the interpretation that will save the act. *Id.*; *see also Mayor of Ocean City v. Bunting*, 168 Md. App. 134, 146 (2006).

The ultimate objective in interpreting a statute is to extract and effectuate the actual intent of the legislature in enacting the statute. *Reier v. State Dep't of Assessments & Taxation*, 397 Md. 2, 26 (2007). The process begins with an examination of the plain language of the statute. *Id.* Reference may be made to the statute's legislative history to "confirm conclusions or resolve questions" from an examination of the text. *Bell v. Chance*, 460 Md. 28, 53 (2018) (quoting *Blue v. Prince George's Cty.*, 434 Md. 681, 689 (2013)).

The CBL specifies that "[n]egotiations for a memorandum of understanding shall be considered closed sessions under § 3-305 of the General Provisions Article." State Pers. & Pens. § 3-501(e) (2015). Prior to 2006, the provision read, "Negotiations **or matters relating to negotiations** for a memorandum of understanding shall be considered closed sessions under

§ 10–508 of the State Government Article." (emphasis added). The bill file for Senate Bill 348 from the 2006 legislative session, which deleted "or matters relating to negotiations," does not indicate what the legislative intent was in deleting these words. But generally speaking, the change indicates the legislature's intent to narrow the provision. The bill file for HB179 from the 1999 legislative session, which created the CBL, similarly contains no discussion of what the legislative intent was regarding this provision.

Turning to the plain language, the provision clearly mandates that the negotiating sessions "be considered closed sessions under" the Open Meetings Act.[11] The purpose of the Open Meetings Act was explained by the General Assembly as follows:

> (a) It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:
> (1) public business be conducted openly and publicly; and
> (2) the public be allowed to observe:
> (i) the performance of public officials; and
> (ii) the deliberations and decisions that the making of public policy involves.
> (b)(1) The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.
> (2) The conduct of public business in open meetings increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.
> (c) Except in special and appropriate circumstances when meetings of public bodies may be closed under this title, it is the public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings.

Md. Code Ann., Gen. Provisions § 3-102 (2019).

The Open Meetings Act imposes certain obligations on a public body. Generally, a public body must meet in open session. *Id.* § 3-301. It must provide notice to the public and

[11] At the time of the enactment of the CBL in 1999, the Open Meetings Act was at Title 10, Subtitle 5 of the State Government Article. The Act has since been moved to the General Provisions Article. Acts 2014, ch. 94, § 1 (effective Oct. 1, 2014).

provide the public with an agenda for meetings. *Id.* §§ 3-302, 302.1. It must allow the public to attend an open session. *Id.* § 3-303. It must keep minutes for its meetings that detail the items considered by the public body and any action and vote taken during a meeting. *Id.* § 3-306.

It is not by accident that it is called the Open Meetings Act—the Act regulates meetings of public bodies and what must occur before and after such meetings. As a matter of public policy, the General Assembly has decided that attendance at, reporting on, and broadcasting of meetings of public bodies helps ensure government accountability. To that end "the deliberative and decision-making process in its entirety . . . must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business." *City of New Carrollton v. Rogers*, 287 Md. 56, 71-72 (1980).

However, the Act, by its plain terms, does not regulate what occurs outside of meetings of public bodies. The Act allows, but does not require, a public body to exclude the public from a meeting based on fifteen enumerated exceptions. Gen. Provisions § 3-305 (2019). Because the ability to close a meeting is permissive, rather than mandatory, there is no remedy provided by the Act for disclosing information from a closed session.

While I could find no reported cases from Maryland discussing the issue, the consensus from other states is that closed session discussions are not confidential or privileged. *See Dillon v. City of Davenport*, 366 N.W.2d 918, 921 (Iowa 1985) (Iowa Open Meetings Act does not specify that the discussions at the closed meeting acquire the status of confidential communications that are privileged from any use other than that specified); *Nebraska ex. rel. Upper Republican Nat. Res. Dist. v. Dist. Judges for Chase Cty.*, 728 N.W.2d 275, 280 (Neb. 2007) ("[W]hen the Legislature intends to create a discovery privilege, it does so with clear and unambiguous language. In view of the fact that the Open Meetings Act contains no language relating to a closed session discovery privilege, we conclude that no such privilege exists in Nebraska."); *Springfield*

Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Emps., Local 530, 667 N.E.2d 458, 467 (Ohio 1995) (no absolute privilege for collective bargaining discussions held in closed session, but trial court may limit discovery); *Connick v. Brechtel*, 713 So.2d 583, 587 (La. Ct. App. 1998) ("[T]he fact that some matters may be discussed in executive session does not render the School Board's discussions and actions taken in executive session privileged."); *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 452 (Wisc. 2008) ("[W]e find no language in our own open meetings laws indicating that our legislature intended to create a broad discovery privilege for communications occurring in closed sessions of governmental bodies, in contrast with the numerous other privileges that explicitly *are* provided for in our discovery statutes."); *State ex rel. Marshall Cty. Comm'n v. Carter*, 689 S.E.2d 796, 804 (W. Va. 2010) ("[W]e hold that the provision of the Open Governmental Proceedings Act which recognizes in specific and limited circumstances the right of governing bodies to meet in an executive session which is closed to the public is not intended to prevent the legitimate discovery in a civil action of matters discussed in an executive session which are not otherwise privileged." (citation omitted)).

When engaged in statutory interpretation, a reviewing court should "neither add words to, nor delete words from, a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature chose to use." *W. Corr. Inst. v. Geiger*, 371 Md. 125, 142 (2002). The General Assembly could have either created a statutory privilege for collective bargaining discussions under the CBL to protect them from disclosure outside of the negotiating sessions or specified that disclosure of information from negotiation sessions constitutes a ULP under Section 3-306. The General Assembly chose to do neither.

I conclude that the plain language of the CBL does not support a categorical prohibition on public discussion of what occurred during collective negotiating sessions. I further conclude that there is no evidence of legislative intent to create the type of categorical prohibition

advanced by the State. This interpretation does not render the provision meaningless. Even though the parties may discuss the progress of negotiations in the public domain following the negotiations, there is value to giving the parties the breathing space to deliberate behind closed doors.

It is also important to note that during the 2017 negotiations AFSCME did not provide any source documents reflecting the actual proposals exchanged and did not provide verbatim transcripts or audio recordings of the meetings. There was one instance where it put one of the State's comments from a meeting in quotations. Certainly, what AFSCME provided in its bargaining updates was something less than "the deliberative and decision-making process in its entirety," access to which is protected by the Open Meetings Act. *City of New Carrollton v. Rogers*, 287 Md. 56, 71-72 (1980).

6. The *Ehrlich* Case

The State also cites to *Ehrlich* in support of its argument that AFSCME should be compelled to utilize non-public methods of communication to communicate with the employees it represents. In *Ehrlich*, AFSCME had filed a complaint against Governor Ehrlich asserting that the State had committed a ULP by failing to engage in collective bargaining negotiations because AFSCME did not agree to its proposed ground rule regarding media contacts. 2005 WL 6193427, at *6. The ground rule stated: "During the period of negotiations, from the initial bargaining session through the final session, the parties agree not to discuss the proceedings with the media. The parties further agree that neither side shall unilaterally issue news releases regarding what transpires at a bargaining session." *Id.* at *6 n.15. The SLRB determined that the State was justified in refusing to bargain with AFSCME because AFSCME had insisted that it had an unqualified obligation to the public to discuss the proceedings with the media. *Id.* at *7.

At the core of the SLRB's decision in *Ehrlich* was its conclusion that AFSCME's conduct tended to interfere, restrain, or coerce the State's free exercise of its collective bargaining rights. *Id.* at *7 n.18. The SLRB concluded that "[n]egotiating in the media is a form of negotiating directly with the public rather than bilaterally with Respondents' statutory bargaining representative, i.e., the Governor." *Id.* at *7. Thus, "[t]he clear design and objective of negotiating in this manner is to bring public pressure to bear to obtain from [the State] whatever [AFSCME] is unable to achieve through . . . negotiations." *Id.*

I conclude that *Ehrlich* stands only for the proposition that the parties are not permitted to resort to the media to bring public pressure to bear upon the negotiations.[12] Because the "clear design and objective" of the communications in question is not to bring public pressure to bear upon the negotiations, *Ehrlich* is distinguishable. Additionally, the communications in question are statutorily protected, unlike the communications in *Ehrlich.*

AFSCME leaders and rank-and-file members are trained about the importance of communication, and the record amply reflects the importance of communication to AFSCME. For example, the AFSCME Constitution stresses the democratic nature of the organization and the right of employees to fully participate in decision-making, "specifically includ[ing] decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment." AFSCME's training handbooks for Officers and Stewards stress that it is important to "increase union visibility in the workplace and community" through constant communication, and to "go where your co-workers congregate . . . . Update your local union website so members can get current information online."

[12] Although the State argued that the Court of Special Appeals decision upholding the SLRB's decision in *Ehrlich* supports the State's argument, I decline to consider the case as it is not reported. *See* Md. Rule 1-104 ("An unreported opinion may not be cited in any paper, brief, motion, or other document filed in this Court, or any other Maryland court, as either precedent within the rule of *stare decisis* or as persuasive authority.")

There is also significant evidence in the record to show that it is necessary for AFSCME to utilize any and all methods of communication to reach the more than 17,000 employees that it represents. AFSCME's covered employees are at more than 800 work sites throughout each of the twenty-four counties of the State and the City of Baltimore. Although the testimony of AFSCME's witnesses and the documentary evidence make it clear that face-to-face communication is preferred, this presents a major challenge for a statewide organization spread across so many work sites throughout the State. The use of AFSCME's website and social media channels provides an alternative to face-to-face communication that is participatory in a way that a bulletin board will never be. The website and social media accounts of AFSCME can also be updated quickly, allowing AFSCME to spread information more quickly and efficiently than other methods of communication. Younger employees, the next generation of rank-and-file members and leaders of the organization, seem to respond better to social media. And the website and social media allow AFSCME to reach the large number of employees that do not have a State email address and therefore do not receive AFSCME's emails. These social media tools help AFSCME in its efforts to organize the employees it represents and grow as an organization.

The State waited until its November 27, 2018 letter to AFSCME to first identify a specific communication that it found objectionable. In that letter, the State objected to the communication on the basis that AFSCME "misrepresented" and "mischaracterized" a proposed correctional officer bonus. In its objection, the State did not argue that the communication was sent directly to the press or to any other member of the public. The State did not explain either in the letter or at the hearing how this or any other communication by AFSCME impacted its bargaining posture or why the communications in question had a "chilling" effect on bargaining. There is not even a colorable argument that any of the communications from the 2017

negotiations could be deemed coercive or intended to intimidate the Governor. The parties were able to reach resolution in 2017.

AFSCME's communications during the 2017 negotiations were clearly aimed at the employees it represents, and not aimed at the public at large or the media. There is no evidence that those communications were sent to the press by either AFSCME or any of its locals; nor is there any evidence that AFSCME or any of its locals spoke to the press about the status of negotiations since the SLRB decided the *Ehrlich* case. AFSCME did not tag certain individuals or news organizations in its Facebook and Twitter postings with links to the collective bargaining updates. The content of the communications from the 2017 negotiations does not show any intent to communicate with anyone other than AFSCME's covered employees.

The mere possibility that a member of the public or the press could potentially come upon the bargaining updates does not mean that the clear design and objective of the communications is nefarious or intended to impair the State's bargaining rights. There is no credible evidence in the record from which I can infer that anyone other than the intended recipient, State employees, saw the communications in question.[13]

There are also significant differences between communicating with the press and communicating with the employees you represent using a website or social media. Most importantly, communications that are targeted at the employees that a union represents do not have the "clear design and objective" of bringing pressure to bear from the public. Instead, these communications serve as a means of updating employees as to the status of negotiations and rallying those employees. Such activity is at the core of the rights protected by the CBL and,

[13] The State submitted into evidence a list of legislators and journalists who follow AFSCME's Twitter page, but the printout is undated and tells me nothing about whether the list of legislators and journalists was following AFSCME's Twitter page during the 2018 negotiations or whether they actually saw the posts in question. As such, I give little weight to the document, concluding that it constitutes a post-hoc rationalization by the State. Even if the list of legislators and journalists did see the bargaining updates in 2017, there is no evidence that they acted upon them and thus no pressure was brought to bear on the State.

arguably, is required by the CBL. That is because State employees have the right to be fairly represented by their exclusive representative in collective bargaining. State Pers. & Pens. § 3-301(a)(2) (2015). Violation of the duty of fair representation is a ULP. *Id.* § 3-306(b)(6) (Supp. 2019).

Further, communicating regarding the status of collective bargaining and even the proposals and counterproposals is necessary because all the employees represented by AFSCME have the right to vote, during the ratification process, on any agreement that is reached with the State. The ratification process may have a very quick turnaround time if, as occurred in 2017, an agreement is reached around the time that the Governor's budget must be sent to the General Assembly. As such, there may simply not be enough time for AFSCME to give a blow-by-blow recap of the negotiations to its employees before the employees vote on whether to accept the agreement.

The State argues that AFSCME could use a password-protected website, closed Facebook group, or send emails to accomplish its communication goals. The notion that the government can pick your method of communication for you and decide which method of communication has the most efficacy is not consistent with First Amendment principles. Further, the record shows that AFSCME's website does not have a password-protection feature and AFSCME would have to ask the website creator, Union Hall, for a special change to its nationwide template. Additionally, the creation and maintenance of a closed Facebook group would undoubtedly require more time and effort on the part of AFSCME's communication director to vet potential group members and administer the group. That these proposed solutions impose a burden on AFSCME and its covered employees is beyond doubt. Furthermore, there are problems with AFSCME's ability to communicate via email: they do not have correct emails for

all employees in their bargaining units, some employees don't have State government emails, and AFSCME's emails sometimes are routed to Spam folders.

There have also been a number of changes since the *Ehrlich* decision that render its logic less persuasive as applied to the facts of this case. The most obvious example is the 2018 changes to the CBL that guarantee exclusive representatives the right to speak to all employees in their bargaining unit. These were made at least in part so that exclusive representatives can communicate with *all employees* they represent regarding the status of collective bargaining negotiations. This was necessary because of the expectation, since realized in *Janus*, that the Supreme Court would strike down as unconstitutional the charging of service fees to state employees who choose not to join a union. The CBL therefore afforded an exclusive representative greater latitude to speak to both members and nonmembers in order to convince them to become a dues-paying member or remain one. This was the legislative intent. Again, the plain words of the statute are instructive. The General Assembly could have qualified the right to communicate, for example, by adding language that requires the exclusive representative to communicate with its employees regarding collective bargaining using only non-public methods, but chose not to.

Additionally, there are a number of leaps of logic in the *Ehrlich* decision that do not stand up to close scrutiny. The SLRB did not address the constitutional implications of its decision, simply positing in a footnote that "[p]rotections afforded to free speech in a labor-management relations context are not absolute." To support this proposition the SLRB cited to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The citation is misplaced. In *Gissel*, the Supreme Court held that an "employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, [29 U.S.C. § 158(c)]

merely implements the First Amendment . . . ." *Id.* at 617. The *Gissel* case is about the First Amendment rights of a private employer to speak; it does not speak to the right of a public employer to suppress constitutionally protected speech using ground rules. Additionally, the SLRB cited to *Ohio Association of Public School Employees, Local 530 v. State Employee Relations Board*, for the proposition that "negotiating in good faith requires each party to negotiate bilaterally with the other party's authorized representative." 2005 WL 6193427, at *7. What the SLRB failed to mention was that the appellate court upheld the reversal of the Ohio State Employee Relations Board's conclusion that the union committed a ULP when it twice spoke out about negotiations at a public school board meeting and issued a press release that was reported on. If anything, this case stands for the opposite of what the SLRB asserted in *Ehrlich*. The SLRB's decision in *Ehrlich* rests on rather tenuous grounds.

D. The Collective Bargaining Timeframes

AFSCME argues that the State committed a ULP during the 2018 negotiations by failing to agree to exchange its economic proposal by a date certain and by failing to agree to meet in person on at least a weekly basis until a deal is reached. AFSCME argues that the above conduct had the effect of depriving AFSCME of the fact finding process. AFSCME argues further that the parties are required to begin negotiations prior to October 25th or there will be no basis on which to invoke the fact finding process.

The State argues that the only mandatory deadline in the CBL is the deadline for conclusion of negotiations, which is January 1. The State argues that to require the parties to conclude negotiations by October 25th, the deadline to invoke fact finding, would ignore the Governor's constitutional duty to prepare a balanced budget.

Findings of Fact 5, 7, 30-76, 80-84, 86, 88-96, and 105-106 inform the discussion below.

1. Weekly In-Person Meetings

The CBL requires the parties to "meet at reasonable times and engage in collective bargaining in good faith to conclude a written memorandum of understanding or other written understanding." State Pers. & Pens. § 3-501(c)(1) (2015). Under the NLRA, the obligation to bargain collectively is a "mutual obligation" to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," which are mandatory subjects of bargaining. 29 U.S.C.A. § 158(d).

AFSCME asserts that the requirement to meet at reasonable times and engage in collective bargaining in good faith implicitly requires the State to meet in person on a weekly basis. In support of this argument, AFSCME cites to cases that discuss the importance of in-person meetings to the collective bargaining process. *See NLRB v. P. Lorillard Co.*, 117 F.2d 921 (6th Cir. 1941) (holding that the NLRA requires in-person negotiations at reasonable times and places unless the parties agree otherwise); *Fountain Lodge*, 269 NLRB 674, 1984 WL 36228 (Mar. 30, 1984) (holding that employer violated the NLRA by refusing to meet in person and bargain with the union).

For its part, the State did not contest the fact that it has a legal obligation to meet in person with AFSCME. Instead, it argued that there is no requirement that it meet in person every week, especially here where the negotiations were solely regarding wages and not regarding a comprehensive MOU.

The NLRB case law is clear: the NLRA requires in-person negotiations. However, there is no explicit requirement either in the CBL or the NLRA with respect to the frequency of in-person meetings. The cases cited by AFSCME in its complaint were situations where there

was a complete and categorical refusal to meet in person by the employer. Those cases are distinguishable from the present case, where the State agreed to meet in person, just not weekly.

The State supported its position by referencing the operational impact of having forty-five AFSCME bargaining team members out of work on a weekly basis. This is certainly a legitimate consideration for management before agreeing to meet on a weekly basis and is consistent with the CBL's reservation of certain rights to ensure that management can carry out the mission of the employer. *See* State Pers. & Pens. § 3-302 (2015). The State further supported its position by distinguishing an economic reopener, where the only issue to be addressed is State employee compensation, from negotiations over a three-year MOU that covers many more subjects. The 2017 MOU has sixty-nine pages. A wage proposal can be as short as a single page. Thus, it is not clear from the record before me that weekly in-person meetings were necessary for the parties to come to an agreement.

The State's final offer prior to AFSCME's filing of the first ULP was to meet every other week and more frequently if needed. Since the State's final offer did not include a categorical refusal to meet in person and did include a willingness to meet more frequently than biweekly if necessary, I conclude that AFSCME has not provided sufficient evidence for me to conclude that the State's failure to agree to weekly in-person negotiations constituted a ULP.

2. The Collective Bargaining Calendar

AFSCME also alleges that the State committed a ULP by disregarding the collective bargaining calendar during the 2018 negotiations. Specifically, AFSCME argues that the State disregarded the collective bargaining calendar when it refused to commit to make all efforts to conclude negotiations by October 25th and to make an economic proposal on any date certain. AFSCME argues that the State's failure to commit to multiple bargaining sessions prior to October 25th rendered the fact finding process a "mere hollow formality."

The State argues that AFSCME's proposed ground rule language requiring the parties to make all efforts to conclude negotiations by October 25th is not supported by the statutory language, which only imposes a January 1 deadline for conclusion of items that must be included in the Governor's budget. The State argues further that to require the parties to conclude negotiations by October 25th would mean that the Governor would be forced to ignore December revenue estimates in making a firm offer to AFSCME and other exclusive representatives. According to the State, this would "wreak havoc" on the budget process and be "fiscally reckless and contrary to the public interest."

The CBL contains two commands regarding the schedule for collective bargaining. The first is that the "parties shall make every reasonable effort to conclude negotiations in a timely manner for inclusion by the principal unit in its budget request to the Governor." State Pers. & Pens. § 3-501(c)(1) (2015). This provision was in the CBL as passed in 1999. The second command is that the "parties shall conclude negotiations before January 1 for any item requiring an appropriation of funds for the fiscal year that begins on the following July 1." *Id.* § 3-501(c)(2)(i). This provision was added in 2002. The Budget Reconciliation and Financing Act of 2002, ch. 440, 2002 Md. Laws 3559.

Although the deadline for the submission of agency budgets is not set by law, it typically occurs in September. *See* Dep't of Budget & Mgmt., *Fiscal Year 2021: Operating Budget Submission Requirements* § I.4 (2019), https://dbm.maryland.gov/budget/Documents/operbudget/2021-instructions/FY2021OperatingBudgetSubmissionRequirements.pdf; see *also* Md. Const. art. III, § 52(11) ("For the purpose of making up the Budget, the Governor shall require from the proper State officials (including all executive departments, all executive and administrative offices, bureaus, boards, commissions and agencies that expend or supervise the expenditure of, and all

institutions applying, for State moneys and appropriations) such itemized estimates and other information, in such form and at such times as directed by the Governor.") If the parties are required by the CBL to make every reasonable effort to conclude negotiations by September, then clearly negotiations must begin at the very latest in September. This reading of the statute is confirmed by the fact finding provision, which allows either party to request a fact finder if the parties do not conclude negotiations for the next fiscal year by October 25th. State Pers. & Pens. § 3-501(c)(3)(i) (2015).

This reading is further confirmed by the legislative history for Senate Bill 346, cross-filed as House Bill 605, from the 2006 legislative session. SB 346 made various changes to the CBL including the addition of the fact finding process. The bill file contains various references to the lack of a dispute-resolution mechanism for situations where the parties reach an impasse in negotiations. Impasse is a term of art from labor law that refers to a situation where the parties are deadlocked on a mandatory bargaining subject. R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 448 (1976). Under NLRA precedent, only after bargaining, in good faith, to impasse on a mandatory subject of bargaining can an employer unilaterally implement the best offer made in negotiations. *NLRB v. Katz*, 369 U.S. 736, 745 (1962).

The bill file contains references from the supporters of the bill to impasses that occurred during the 2004 and 2005 negotiations. In addition, the Senate Finance Committee's summary document indicates that the bill "allow(s) non-binding fact finding if there is an impass[e]." The references to impasse, none of which are contradicted by the other documents in the bill file, make it clear that the legislature intended to create a process to help resolve, with the aid of a neutral third party, situations where the parties have become deadlocked over a mandatory

bargaining subject. In order for there to be an impasse, negotiations must have commenced and the parties must have exchanged proposals and attempted to resolve the dispute in good faith.

The opponents of the bill also understood that the proposed legislation would require substantive negotiations prior to October 25th. Governor Ehrlich vetoed Senate Bill 346 on April 7, 2006, and explained his decision in part as follows:

> The process created by Senate Bill 348 requires that negotiations be completed before the information about resources and the expected limits on State spending are available. Under the bill, agreement would be required by October 25, almost 6 weeks before the necessary information is available. The fact finder's recommendations are to be made in writing before November 20, several weeks before revenue estimates and the Spending Affordability recommendations are available. The fact finder, unlike both the Governor and the General Assembly, will have no restraints in finding facts or making recommendations and will not have the facts about the State's fiscal condition or outlook.

The General Assembly then overrode Governor Ehrlich's veto on April 10, 2006, and the bill became law. Therefore, it is clear from the plain text of the statute and the legislative history that the parties are required to exchange proposals on the bargaining topics prior to the October 25th deadline for requesting that a fact finder be employed.

AFSCME's proposed ground rule, which the State rejected, would have required negotiations to start the week of September 24 and the parties to exchange initial economic proposals at the first meeting. It would have also required the parties to agree to make every effort to conclude negotiations before October 25, 2018. These requirements are consistent with the CBL.

However, in addition to the above requirements, AFSCME's proposed ground rule also stated "[t]hat the Board of Revenue Estimates has not reported or released data shall not delay the conduct or completion of negotiations." The State argues that it cannot make a "firm" wage proposal in September or October because it needs to wait until December when revenue outlooks are clearer. *See* Md. Code Ann., State Fin. & Proc. § 6-106(b)(1) (Supp. 2019)

(requiring the Board of Revenue Estimates to submit to the Governor an itemized statement of the estimated State revenues for the upcoming fiscal year in December, March and September of each year). In support of this argument, the State points to State Personnel and Pensions Section 3-103, which provides that "[t]his title and any agreement under this title do not limit or otherwise interfere with the powers of the Governor or the Maryland General Assembly under Article III, § 52 of the Maryland Constitution." State Pers. & Pens. § 3-103 (2015). Article III, Section 52 of the Maryland Constitution requires the Governor to submit a balanced budget to the General Assembly by the third Wednesday of January. The Governor is required to utilize the "most recent" Board of Revenue estimates in the proposed budget sent to the General Assembly. State Fin and Proc. § 6-106(b)(2)(i) (Supp. 2019).

The State pointed out that in 2017 it did not make a firm offer prior to AFSCME requesting a fact finder. Instead, the State made offers contingent on forthcoming December revenue estimates, such that AFSCME's covered employees would receive a specific pay increase if revenues were below the specific amount, and a greater pay increase amount if revenues were above the specified amount. AFSCME does not appear to take issue with this approach, as its witnesses testified that the fact finding process in 2017 had value to its bargaining unit employees.

I conclude that the approach that is most consistent with legislative intent is to interpret the CBL to require the parties to negotiate in good faith and exchange proposals on mandatory subjects of bargaining prior to October 25th, but to allow the State to utilize offers that are contingent on December revenue estimates, if so desired. To be clear, the State could also choose to make a firm offer prior to October 25th, at the possible expense of other budgetary priorities. However, the ground rules that AFSCME proposed, while consistent with the timeframes in the CBL, could be read as precluding the State from making a contingent offer.

Thus, while AFSCME was well within its bounds to request the ground rule, including the language regarding the Board of Revenue Estimates, the State was under no obligation to agree to such language. As such, the State did not commit a ULP by failing to agree to the ground rule proposed by AFSCME.

Of course, the State failed to engage in any negotiations regarding wages with AFSCME prior to October 25th because of the disagreement regarding the other ground rules. That disagreement foreclosed any opportunity by AFSCME to select a fact finder. For this and the reasons stated above, the State committed a ULP during the 2018 negotiations.

IV. Conclusion

"The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). The ground rules at issue in this case strike at the heart of a union's constitutional and statutory rights to speak, to think, to communicate, to organize, to petition. It is axiomatic that communication is a key component of an ability to act in concert. The ground rules would impair the rights of State employees to self-organize.

Thus, the State has a high bar to meet in justifying its insistence that AFSCME agree to the ground rules. As a starting point, it must demonstrate that the recited harms are real, and not merely conjectural. It has not met this high bar. It does not matter that AFSCME has alternative communication methods available, or that the ground rules allow AFSCME to petition the General Assembly after the conclusion of collective bargaining negotiations. One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. *Schneider v. State*, 308 U.S. 147, 163 (1939).

Ultimately, this matter is decided based on well-settled principles of labor law. An employer commits a ULP when it refuses to bargain over a mandatory subject of bargaining.

Wages are a mandatory subject of bargaining. Ground rules are not mandatory subjects of bargaining. The State cannot refuse to comply with its obligation to bargain over wages in order to force AFSCME to agree to its ground rules.

As the days grew shorter and the holidays approached, AFSCME's demand that the State bargain over wages was denied three times. AFSCME's final offer to bargain, including on New Year's Eve if necessary, was not met with the courtesy of a reply. As the testimony of AFSCME's witnesses demonstrated, it was not just AFSCME's demand but the demand of the facility maintenance technician in Calvert County entrusted with maintaining the State's critical infrastructure; the demand of the correctional officer in Baltimore City supervising inmates at the State's correctional facilities; the demand of the conservation specialist in Washington County providing support to farmers; the demand of the social worker providing care to psychiatric patients at Spring Grove Hospital in Baltimore County; the demand of the parole and probation agent tasked with ensuring that returning citizens are reintegrated into society; and the demand of every other covered State employee stretching from Snow Hill to the mountains of Western Maryland.

The State may have had good arguments as to why these employees did not deserve a higher wage in 2018. The collective bargaining law requires that these arguments be made at the bargaining table. Ground rules cannot become an escape hatch that allows the State to evade its statutory obligation to collectively bargain with State employees.

By refusing to bargain over wages with AFSCME during the 2018 negotiations, the State committed a ULP.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Discussion, I conclude that the State committed an unfair labor practice during the 2018 negotiations when it refused to negotiate regarding wages with

AFSCME because AFSCME would not agree to (1) a proposed ground rule restricting AFSCME's ability to seek statutory changes from the legislature, and (2) a proposed ground rule restricting AFSCME's ability to communicate regarding negotiations on AFSCME's website and social media accounts. Md. Code Ann., State Pers. & Pens. §§ 3-306(a)(8), 3-301(a), 3-307(a) (2015 & Supp. 2019); *AFSCME v. Ehrlich*, SLRB ULP Case No. 05-U-01, 2005 WL 6193427 (Mar. 11, 2005); *NLRB v. Katz*, 369 U.S. 736 (1962).

I further conclude that the State committed an unfair labor practice during the 2018 negotiations when it refused to negotiate regarding wages with AFSCME prior to October 25, 2018. Md. Code Ann., State Pers. & Pens. §§ 3-306(a)(1), 3-501(c)(1), (c)(3) (2015 & Supp. 2019).

I further conclude that the State did not commit an unfair labor practice during the 2018 negotiations when it refused to agree to meet on a weekly basis with AFSCME. Md. Code Ann., State Pers. & Pens. § 3-501(c)(1) (2015).

I further conclude that AFSCME did not commit an unfair labor practice during the 2018 negotiations when it refused to agree to (1) a proposed ground rule restricting AFSCME's ability to seek statutory changes from the legislature, and (2) a proposed ground rule restricting AFSCME's ability to communicate regarding negotiations on AFSCME's website and social media accounts. Md. Code Ann., State Pers. & Pens. §§ 3-301(a), 3-307(a) (2015 & Supp. 2019); *AFSCME v. Ehrlich*, SLRB ULP Case No. 05-U-01, 2005 WL 6193427 (Mar. 11, 2005); *NLRB v. Katz*, 369 U.S. 736 (1962).

PROPOSED ORDER

I **PROPOSE** that the State Labor Relations Board:

ORDER the State to immediately cease and desist from requiring AFSCME to agree to a ground rule restricting AFSCME's ability to seek statutory changes from the legislature before

the State will engage in collective bargaining over wages or any other mandatory subject of bargaining;

ORDER the State to immediately cease and desist from requiring AFSCME to agree to a ground rule restricting AFSCME's ability to communicate regarding the status of negotiations utilizing its website and social media accounts;

ORDER the State to immediately commence collective bargaining with AFSCME;

ORDER the State to commence bargaining and exchange substantive proposals with AFSCME prior to October 25th in forthcoming bargaining years;

ORDER the State to post a notice at all physical work sites where employees from AFSCME bargaining units convene informing employees in AFSCME's bargaining units of the terms of this Order. Such notice shall be written in clear, plain language and shall also inform employees in AFSCME's bargaining units of their rights under Section 3-301(a) of the State Personnel and Pensions Article. Such notice shall also be posted by the State on AFSCME Council 3's Facebook page, and may be sent by email.

I further **PROPOSE** that the State Labor Relations Board:

ORDER that the State's unfair labor practice complaint (SLRB Case No. 2019-U-06) against AFSCME be **DENIED** and **DISMISSED**.

November 6, 2019
Date Decision Issued

Brian Patrick Weeks
Administrative Law Judge

BPW/dlm
#182172

RIGHT TO FILE EXCEPTIONS

Any party may file exceptions, in writing, to this Proposed Decision with the State Labor Relations Board, in accordance with COMAR 14.32.02.18. The Office of Administrative Hearings is not a party to any review process.

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AMERICAN FEDERATION OF	*	**BEFORE BRIAN PATRICK WEEKS,**
STATE, COUNTY AND MUNICIPAL	*	**AN ADMINISTRATIVE LAW JUDGE**
EMPLOYEES COUNCIL 3 (AFSCME)	*	**OF THE MARYLAND OFFICE OF**
v.	*	**ADMINISTRATIVE HEARINGS**
STATE OF MARYLAND	*	
-AND-	*	
STATE OF MARYLAND	*	**OAH No.: SLRB-X-01-19-17149**
v.	*	**SLRB Nos.: 2019-U-03**
		2019-U-06
AFSCME	*	**2019-U-07**

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APPENDIX - FILE EXHIBIT LIST

I admitted the following joint exhibits offered by the parties:

Joint Ex. 1	Correspondence Between the Parties
A	Letter from AFSCME to State, October 1, 2018
B	Letter from State to AFSCME, October 10, 2018
C	Letter from State to AFSCME, October 16, 2018
D	Letter from AFSCME to State, October 22, 2018
E	Letter from AFSCME to State, October 31, 2018
F	Letter from State to AFSCME, November 1, 2018
G	Letter from AFSCME to State, November 20, 2018
H	Letter from State to AFSCME, November 20, 2018
I	Letter from AFSCME to State, November 26, 2018
J	Letter from State to AFSCME, November 27, 2018
K	Letter from AFSCME to State, November 29, 2018
L	Letter from State to AFSCME, December 4, 2018
M	Letter from AFSCME to State, December 14, 2018
N	Letter from State to AFSCME, December 19, 2018
O	Letter from AFSCME to State, December 20, 2018
P	Letter from AFSCME to State, December 27, 2018
Joint Ex. 2	Memorandum of Understanding (MOU) for Bargaining Units A, B, C, D, and F, December 31, 2017
Joint Ex. 3	MOU for Bargaining Unit H, December 31, 2017
Joint Ex. 4	AFSCME's ULP Complaint, signed October 16, 2018
Joint Ex. 5	AFSCME's ULP Complaint, signed January 11, 2019
Joint Ex. 6	State's ULP Complaint, signed December 31, 2018

I admitted the following exhibits on AFSCME's behalf:

AFSCME Ex. 1	AFSCME Constitution, 2018
AFSCME Ex. 2	AFSCME Resolution No. 71, 1984
AFSCME Ex. 3	AFSCME Officers Handbook, updated May 2017
AFSCME Ex. 4[1]	AFSCME Stewards Handbook, June 2014
AFSCME Ex. 6	1997 Ground Rules, signed June 24, 1997
AFSCME Ex. 7	2016 Ground Rules, signed December 8, 2016
AFSCME Ex. 8	2017 Proposed Ground Rules, undated
AFSCME Ex. 9	Letter from AFSCME to State, August 15, 2017
AFSCME Ex. 10	Letter from AFSCME to State, August 30, 2017
AFSCME Ex. 11	2017 Ground Rules, signed August 30, 2017
AFSCME Ex. 12	Letter from AFSCME to State, October 25, 2017
AFSCME Ex. 13	AFSCME's Fact Finding Demands, November 6, 2017
AFSCME Ex. 14	Case No. 01-17-0005-7176 Fact Finding Recommendations, November 19, 2017
AFSCME Ex. 15	Case No. 01-17-0005-7176 Supplement to Fact Finding Recommendations, November 29, 2017
AFSCME Ex. 16	Letter from State to AFSCME, December 22, 2017
AFSCME Ex. 17	AFSCME Bargaining Team Flyer, undated
AFSCME Ex. 18	AFSCME Bargaining Team Responsibilities, undated
AFSCME Ex. 19	Letter from AFSCME to State, July 1, 2018[2]
AFSCME Ex. 20	Ground Rules Iterations 2018
A	AFSCME 9/21/18
B	State 9/26/18
C	State 10/12/18
D	State Counter 11/8/18

[1] AFSCME stated there was no Exhibit 5 due to a labeling error.
[2] AFSCME indicated that this letter was misdated and the proper date is August 1, 2018.

State Ex. 26	"Bills AFSCME needed to speak out about – but did not initiate" document, undated
State Ex. 27	AFSCME Wage Proposal from 2017 negotiations, undated
State Ex. 28	State Wage Proposal from 2017 negotiations, October 11, 2017
State Ex. 29	*Withdrawn*
State Ex. 30	Letter from State to AFSCME, December 22, 2017
State Ex. 31	*Withdrawn*
State Ex. 32	AFSCME Bargaining Update, September 26, 2017
State Ex. 33	How do I post on a page on Facebook and who can see it?, printed September 8, 2019
State Ex. 34	Like and Interact with Pages, printed September 8, 2019
State Ex. 35	What are the privacy options for Facebook groups?, printed September 8, 2019
State Ex. 36	*Withdrawn*
State Ex. 37[3]	Letter from State to AFSCME, August 7, 2017
State Ex. 38	How do I join a Facebook group as myself or my Page?, printed September 16, 2019
State Ex. 39	Printout of AFSCME Twitter Followers, undated
State Ex. 40	Emails between State and AFSCME, June 5-6, 2017

[3] At the hearing, both the withdrawn exhibit and the August 7, 2017 letter from the State to AFSCME were inadvertently marked as Exhibit 36. I have remarked the Letter as Exhibit 37 and changed the following exhibit numbers to reflect that change.

E	AFSCME 11/8/18
F	State Counter 2 11/8/18
G	AFSCME Proposal 2 11/8/18
H	State 11/14/18
I	State Clean 11/21/18
J	State Mark Up 11/21/18
AFSCME Ex. 21	AFSCME Talking Points, September 25, 2018
AFSCME Ex. 22	AFSCME Talking Points, October 12, 2018
AFSCME Ex. 23	AFSCME Wage Proposal, November 8, 2018
AFSCME Ex. 24	AFSCME Legislative Report, 2018
AFSCME Ex. 25	AFSCME Legislative Report, 2019

I admitted the following exhibits on the State's behalf, unless otherwise noted:

State Ex. 1	*Withdrawn*
State Ex. 2	*Withdrawn*
State Ex. 3	*Withdrawn*
State Ex. 4	*Withdrawn*
State Ex. 5	*Withdrawn*
State Ex. 6	*Withdrawn*
State Ex. 7	*Withdrawn*
State Ex. 8	*Withdrawn*
State Ex. 9	*Withdrawn*
State Ex. 10	*Withdrawn*
State Ex. 11	AFSCME "Update Your Information" website page, printed July 24, 2019
State Ex. 12	AFSCME Twitter posting, January 2, 2019
State Ex. 13	AFSCME Bargaining Update, September 20, 2017
State Ex. 14	AFSCME Bargaining Update, October 4, 2017
State Ex. 15	AFSCME Bargaining Update, October 11, 2017
State Ex. 16	AFSCME Bargaining Update, October 18, 2017
State Ex. 17	AFSCME Bargaining Update, October 20, 2017
State Ex. 18	AFSCME Bargaining Update, October 23, 2017
State Ex. 19	AFSCME Bargaining Update, November 1, 2017
State Ex. 20	AFSCME Bargaining Update, December 20, 2017
State Ex. 21	AFSCME Twitter postings, various dates between September 20 and December 20, 2017
State Ex. 22	AFSCME Twitter posting, October 6, 2018
State Ex. 23	House Bill 864 (2018)
State Ex. 24	House Bill 1017 (2018)
State Ex. 25	*Withdrawn*